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PRESUMPTIONS AND BURDENS

LORD JUSTICE DENNING has advocated and has himself adopted a re-classification of the traditional conceptions involved under the general heading of burden of proof and presumptions. The principles and the new terminology were expounded in an article in *The Law Quarterly Review* (Vol. 61, p. 379), and have since been launched with His Lordship's blessing in *Emmanuel v. Emmanuel* (1945) 61 T.L.R. 538 and *Dunn v. Dunn* [1948] 2 All E.R. 822.

The re-classification distinguishes: (1) legal burdens; (2) provisional presumptions and burdens; (3) compelling presumptions; (4) ultimate burdens; and (5) conclusive presumptions; and discards altogether the old distinction between presumptions of law and presumptions of fact.

Now, of the desirability of some re-classification there can be no doubt. The words 'burden of proof' are habitually used without qualification in at least three different senses. 'The confusion', his Lordship wrote, 'has often been pointed out. The only way to avoid it, whenever the words "burden of proof" are used is to make clear which particular sense is intended.' The word 'presumption' is in no better case; many shades of meaning have been given to it, and although there have been as many attempts to evolve a satisfactory distinguishing terminology, in current judicial usage it is impossible to say of this or that kind of presumption that it has precisely this or that legal effect. It is still true today, as it was fifty years ago, that: 'A change is simply necessary to accurate legal speech and sound legal reasoning; and we may justly expect those who have exact thoughts, and wish to express them with precision, to avail themselves of some discrimination in terminology which will secure their end' (Thayer, *Preliminary Treatise on Evidence*, p. 385). Indeed, the persistence of ambiguity, for another fifty years since these words were written, has intensified the confusion of legal thought. If it appears an almost hopeless task at this late stage to introduce the precise language necessary to clear thought, it is the more urgent that the task be attempted.

While, therefore, wholeheartedly agreeing with Lord Justice Denning's premises, I respectfully differ from his conclusions. The purpose of this article is: first, to try to demonstrate that the suggested re-classification not only fails to provide a satisfactory terminology for distinguishing the several legal concepts involved, but, in one respect, is calculated to perpetuate a judicial error

arising from the very confusion which the re-classification seeks to disperse; secondly, to suggest an alternative re-classification distinguished by an appropriate terminology.

Let us first see what his Lordship says of the different kinds of burden.

'Ultimate Burdens.' Where the ultimate decision of a case depends on the determination of a number of separate issues, the burden on the ultimate issue needs to be distinguished from the burden on the separate issues.' This proposition is unassailable. What is here called the ultimate burden, has sometimes been called the general burden of proof or the burden of proof on the whole case. Once this distinction is made it does not touch the other aspects of the subject and of this no more need be said.

'Legal Burdens.' When the law puts on a party the burden of proving a certain fact in issue as a condition of giving him judgment, that burden never shifts and must be discharged or he will fail. . . . This is the *legal* burden of proving the fact in issue. The incidence of it . . . depends on the rules of substantive law.'

The absolute necessity of distinguishing burden in this sense from any sense in which the burden can properly be said to shift within the scope of a single issue, has been pressed by textbook writers. Professor Wigmore described this kind of burden, accurately but cumbersomely, as 'the risk of non-persuasion'; in *Phipson on Evidence* it is less accurately termed 'the burden of proof on the pleadings'; judicially it has sometimes been distinguished as the burden of 'establishing' the fact in issue. In the sense that this burden is imposed by the substantive law the designation 'legal burden' is unobjectionable. But the epithet is used by Lord Justice Denning to point another distinction. The burden is described as 'legal' in that the failure to discharge it, necessarily and as a matter of law, involves a certain consequence, in contrast with the 'provisional burden', which imposes no such specific legal obligation. It will be necessary to examine the definition of 'provisional burdens' before criticising this distinction. But it is convenient at this point to introduce the expression which, it is submitted, offers the most apt alternative to 'legal burden', namely the 'fixed burden of proof'. This emphasises the vital distinguishing feature of burden in this sense. I shall also adopt in this article Professor Wigmore's convenient phrase 'the proponent of the issue' to designate the party upon whom the fixed burden of the issue rests.

Lord Justice Denning treats of 'provisional presumptions and burdens' under a single heading. For the sake of clarity, and at the expense, perhaps, of logical arrangement, I wish as far as possible to deal separately with these two subjects.

'Provisional burdens' arise in this way. The proponent of the issue introduces his evidence and invites the court to infer the fact in issue. 'The court will decline before the end of the case to rule

whether the fact in issue should be inferred. It will leave the other party to take his own course. . . . As the case proceeds the evidence may first weigh in favour of the inference and then against it, thus producing a burden, sometimes apparent, sometimes real, which may shift from one party to the other, or may remain suspended between them. The party on whom it rests must call evidence or take the consequences, which may not necessarily be adverse; for the place where the burden eventually comes to rest does not necessarily decide the issue: because at the end of the case the court has to decide as a matter of fact whether the inference should be drawn or not. These . . . burdens are therefore *provisional only*.'

With all respect, the fallacy of this analysis is that it omits to take account of one of the most important devices whereby judges are enabled to exercise an effective control over juries. Historically, the separation of the functions of judge and jury has left so deep a mark upon English jurisprudence that the rules and the habits of juristic thought, which it has engendered, are scarcely touched by the present-day decline of jury trial in civil matters. If jury trial is ever abolished, many of these rules and conceptions will yet remain as long as the common law system is in being. The judge sitting alone must constantly be aware of the line which divides his two quite distinct functions. And the proper observation of the distinction is by no means a mere academic matter, but of the highest practical importance in its bearing on the exercise of appellate jurisdiction.

The courts have never been content simply to explain to juries the rules of substantive law and to leave them an unfettered discretion to estimate the legal effect of the evidence before them. They have further insisted that the jury's verdict must be confined within the limits of reasonable inference from the evidence. When the proponent of the issue introduces evidence, which, even if accepted in its entirety, would not entitle the jury to find the fact in issue, the issue must be withdrawn from the jury and the proponent must fail. That is an elementary proposition. The converse proposition, that evidence of a certain kind must lead as a matter of law to a decision of the issue in favour of the proponent, tends for several reasons to be obscured. The jury's function in the second case, is not wholly excluded as it is in the first. It is still necessary to refer to the jury the question whether the evidence tendered is to be believed. What is excluded is the jury's function of drawing inferences from the facts of which direct evidence has been given. Again, the jury's right to insist upon returning a general verdict makes the judge's direction that a particular issue must, if the jury believe the evidence, be decided in the proponent's favour, a less effective control than the power to withdraw the issue altogether from the jury for want of sufficient evidence. But these practical qualifications, to which the judge's control of the jury

must always be subject, do not impair the validity of the theory that the jury's function is only to be exercised within limits which the law prescribes.

It is necessary to distinguish four stages in the production of evidence bearing upon an issue.

1. The proponent of the issue fails to introduce any evidence, or any sufficient evidence, fit for submission to the jury. As a matter of law, the proponent fails upon the issue.

2. The proponent introduces evidence fit for submission to the jury from which the jury *may* infer the fact in issue. Whether they will do so or not will depend on whether they are satisfied by a preponderance of probability or beyond reasonable doubt, as the case may be.

3. The proponent introduces evidence which, if believed, can only lead to one conclusion which the law will recognise as proper, namely a finding in the proponent's favour. If the matter rests there, the jury must be directed that, if they believe the evidence, they must, as a matter of law, decide the issue in the proponent's favour. The opponent of the issue is now in the same position as was the proponent at stage 1. In order to have the issue, as it were, re-opened to the jury, it is for the opponent of the issue to introduce evidence fit for submission to the jury which shall so qualify the proponent's evidence as to rob it of its legally conclusive effect.

4. The opponent of the issue introduces evidence fit for submission to the jury. It is now once again for the jury to decide, on all the evidence, whether the proponent has made out his contention to their satisfaction.

There may be further stages, but it is not necessary to elaborate them here.

It is, of course, true that: 'The court will decline to rule before the end of the case whether the fact in issue should be inferred. It will leave the other party to take his course'. But this does not diminish the importance of distinguishing the different stages. For the parties, an accurate estimate of the stage that has been reached will at all times be a vital tactical consideration. At the end of the case the judge must direct the jury, or indeed himself, if he is sitting alone, according to the stage at which the evidence has come to rest. On appeal the distinction between one stage and another may well be the crucial factor.

It is apparent that only at stages 2 and 4 does the fixed burden of proof come into play. At stages 1 and 3 we are concerned with a burden of quite a different kind. Nor is this burden equivalent to Lord Justice Denning's 'provisional burden'. It is a burden which imposes an obligation on a party to introduce such evidence as the judge shall rule to be sufficient for submission to the jury. This burden sets up before the party who bears it a preliminary legal hurdle which must be surmounted before the jury shall be

entitled to consider the question of *fact* in issue. This burden I propose to call the evidential burden of proof. For simplicity of illustration I have assumed that the evidential burden always falls in the first instance on the proponent of the issue. In fact, although this is the general rule, there are important exceptions to it. But consideration of these must be postponed to our analysis of presumptions.

It now becomes apparent that to appropriate to the fixed burden of proof the exclusive title to be called legal is misleading. For the evidential burden, although it shifts within the scope of a single issue, is nevertheless a burden whose incidence is determined by law, and which involves definable legal consequences.

Once the fixed burden and the evidential burden are clearly distinguished, it is perhaps theoretically legitimate also to speak of a 'provisional burden' resting upon the opponent of the issue at stage 2. But the lawyer cannot afford to 'give to airy nothings a local habitation and a name'. If this burden is 'sometimes apparent, sometimes real,' and 'does not necessarily decide the issue', as indeed it does not, it is too vague a conception to warrant any place in legal terminology. Furthermore, when the evidence comes to rest at stage 2 or stage 4, it is imperative that attention should be directed to the fixed burden of proof. To speak, therefore, of a 'provisional burden' being present at the same time is to introduce an unnecessary source of confusion.

Another ambiguity which has been and continues to be an obstacle to clear thinking upon this part of the subject, is the dual sense conferred by judicial usage upon the phrase '*prima facie* case' or '*prima facie* evidence'. These are applied indiscriminately to the evidence of the proponent both at stage 2 and stage 3; in other words, they signify either that minimum of evidence which must be tendered before the issue can be submitted to the jury, or alternatively, such evidence as shall, if believed, be legally conclusive in the absence of further evidence to qualify or rebut it. This ambiguous usage is so deeply rooted that the hope to eradicate it may be even more forlorn than the attempt appropriately to distinguish the different kinds of burden. And yet the apt discriminatory terminology is ready to hand. The evidence at stage 2 is rightly called '*prima facie*'. The evidence at stage 3 is, it will be submitted, properly distinguishable by that much abused word 'presumptive'. Now, therefore, we must turn to the second branch of the subject and consider the nature of presumptions.

As with 'ultimate burdens' it will be best to dispose at the outset of 'conclusive presumptions', for they do not enter into the controversy. Of these Lord Justice Denning writes:

'It is a misuse of language to speak of any presumption being conclusive, but the meaning is clear enough. On proof of certain facts the court must draw a particular inference, whether true or not, and it cannot be rebutted.'

That certain positive rules of law should be illogically described as 'conclusive presumptions' is, as Professor Thayer pointed out (*op. cit.*, pp. 316 *et seq.*), simply a reflection of their historical origin.

His Lordship classifies rebuttable presumptions as 'provisional' or 'compelling'.

'Relevant facts or circumstances are often said to raise a "presumption", . . . and so they do in the sense that from them the fact in issue *may* be inferred, but not in the sense that it *must* be inferred unless the contrary is proved.' Like the provisional burdens, to which they are correlative, these presumptions are therefore said to be *provisional* only. 'It is a mistake to raise these provisional presumptions into propositions having the force of law. They are recognised by the law but their force depends on ordinary good sense rather than on law. They are only guides to the court in deciding whether to infer the fact in issue or not.'

'*Compelling Presumptions*. It often happens that a party proves facts from which the court *must* in law draw an inference in his favour unless the other side proves the contrary or proves some other fact which the law recognises as sufficient to rebut the inference. . . . These presumptions differ from provisional presumptions in that they have the compelling force of law; and whereas provisional presumptions give rise to provisional burdens within a single issue, a compelling presumption gives rise to a separate issue on which the *legal* burden is on the other side.'

The traditional distinction between presumptions of law and of fact is discarded because: 'Once it is seen that there are many presumptions of law which are provisional only and have therefore the same effect as presumptions of fact (which are always provisional) there is no useful purpose to be served by maintaining the distinction'.

It is submitted, with the greatest respect, that this theory of presumptions is fundamentally unsound.

If the 'provisional presumption' that arises upon proof of certain facts merely enables us to say that from those proven facts the jury may or may not infer the fact in issue, it is, in the first place, difficult to see how such a presumption can be of any assistance as a 'guide to the court in deciding whether to infer the fact in issue or not'. Secondly, we must ask what is the distinction between evidence giving rise to a provisional presumption and *prima facie* evidence generally, that is to say, evidence entitling the party who has adduced it to have the issue left to the jury. In principle the answer appears to be that there is no distinction. Of course, if these observations are true of the new 'provisional presumption', they are equally true of the old 'presumption of fact'. Like 'conclusive presumption', 'presumption of fact' is a misnomer due to the historical accident that many present-day 'presumptions of fact' were once presumptions of a very different

kind (cf. Thayer, *op. cit.*, 327, 328). The truth is that it is neither an apt use of language, nor is it necessary to any legal distinction, to speak of presumptions at all, when what we mean are those legitimate inferences, which it is in the province of the jury to draw or not to draw, as they think fit.

If the line of distinction between presumptions of law and presumptions of fact were satisfactorily drawn, the latter usage might be tolerable as a harmless anachronism. But it is not. Whereas the different senses of 'burden of proof' can be sufficiently distinguished by qualifying epithets, it seems to me that there is only one kind of rebuttable presumption with any title to be so called. It is not a 'provisional presumption', for it has a distinct and certain legal effect. It is not a 'compelling presumption', because it has nothing to do with the fixed burden of proof. Once the precise function of a presumption is properly understood, it will be seen that the best hope alike for clarity of thought and purity of language will be to reserve for the word 'presumption' in all cases this single and precise meaning.

The true presumption, then, has this effect, that when it arises in favour of one party it entitles that party to have the issue decided in his favour unless and until his opponent introduces some evidence to the contrary. In other words a true presumption operates to shift the evidential burden of proof. Besides recognising this positive function of presumptions, it is of equal importance to note that that is the *whole* of their function. Once the party against whom the presumption is operating has introduced the necessary legal minimum of evidence, the presumption is discharged and disappears altogether from the scene; the issue must then be left to be determined by the jury, or the judge of fact, on all the evidence, having regard, if need be, to the fixed burden of proof.

It is customary to describe as a presumption both the rule of law which ordains that evidence of a certain kind shall have a certain effect, and the actual effect of such evidence in a particular case. Strictly speaking the latter is the presumption, the former is the rule of presumption. These rules of presumption are of two classes. In the first class, the law adopts and gives legal effect to ordinary principles of logical inference and natural probability. The second class consists of a great variety of particular rules, spread over every branch of the substantive law, which may have in their make-up, in a greater or less degree, elements of logic and probability, but which depend, in the last analysis, on a purely arbitrary legal determination. The distinction between these classes is of analytical interest only, for the presumptions to which the rules of the different classes give rise are, in their practical effect indistinguishable. Unhappily, however, this distinction has sometimes been marked by the same contrast—between 'presumptions of fact' and 'presumptions of law'—which, as we have seen,

in another and more widely accepted sense, separates the merely permissible inference from the genuine presumption, which stands until rebutted by some evidence.

Some applications of the doctrine of *res ipsa loquitur* afford an illustration of a rule of presumption in the first class. It is another unfortunate ambiguity that the doctrine is sometimes also said to apply in cases where no true presumption is raised. Lord Justice du Parcq said in *Easson v. London and North Eastern Ry.* [1944] K. B. 421 at 425: 'Where an action is based on negligence, the plaintiff has to prove negligence on the part of the defendant, and that by reason of that negligence he has suffered damage. Much has been said about what is called the doctrine of *res ipsa loquitur*. That there is such a doctrine nobody doubts, but, if it is invoked, it is necessary to be sure what the precise doctrine is. The words *res ipsa loquitur* themselves are hardly a proposition of law though they allude to one. They are a figure of speech, by which sometimes is meant that certain facts are so inconsistent with any view except that the defendant has been negligent that any jury which, on proof of those facts, found that negligence was not proved would be giving a perverse verdict. Sometimes, the proposition does not go as far as that, but is merely that on proof of certain facts an inference of negligence may be drawn by a reasonable jury although the precise circumstances are not fully known.' In the first case, therefore,—but not in the second—a presumption of negligence arises. In the absence of evidence to discharge the presumption, the plaintiff will be entitled to succeed: *Laurie v. Raglan Building Co., Ltd.* [1942] 1 K.B. 152. But once the defendant introduces *prima facie* evidence that he took reasonable care, the doctrine of *res ipsa loquitur* goes out of the picture, and the issue must be decided with reference to the fixed burden of proof: *Barkway v. South Wales Transport Co.* [1948] 2 All E.R. 460.

The second class of rules of presumption is well illustrated by the rule that a person who has not been heard of for seven years by those likely to hear of him must be presumed dead. In so far as unexplained absence must sooner or later suggest the inference of death, the presumption is one of logic and probability. But the essence of the rule is that it applies in the case of seven years absence; not a day more is required; not a day less will do. No one could say that logic and good sense need necessarily choose this period and no other. If the presumption to which the rule gives rise is to be classed as provisional only, an inference to be drawn or not as the jury pleases, the period of seven years ceases to have any significance, and the rule becomes meaningless. For, if a jury choose to infer death as a fact from an unexplained absence for something less than seven years, their verdict will not necessarily be set aside. Indeed, in the Probate Division, death will be inferred, in a proper case, after a comparatively short absence: *Re Matthews* [1898] P. 17. Lord Justice Denning supports his

classification of this presumption as provisional with an illustration: 'when a husband has deserted his wife for seven years and she has made no inquiries as to his whereabouts, the fact that she has no reason to believe him to be living within that time may be insufficient to persuade the court to presume his death'. That is, of course, perfectly true. But, with respect, the explanation is not that the presumption of death after seven years absence is a provisional one, but that in the case put the necessary conditions to give rise to the presumption are not satisfied. Before a man's death will be presumed, either the evidence that he has not been heard of must come from those who would, in the nature of things, be likely to hear of him in life, or other persons must show that they have made due inquiry without avail: *Doe d. France v. Andrews* (1850) 15 Q.B. 756. If a man's wife, as in the example, makes no inquiries as to her husband's whereabouts for seven years after he has deserted her, she is certainly not entitled to be regarded as the one person who, in the nature of things, is likely to have heard of him. In this case, therefore, the presumption never arises. Similarly, in cases where evidence has been given by one party sufficient to raise the presumption, the other party will discharge the evidential burden upon him by showing a failure by those who have heard nothing of the absentee to make inquiries appropriate to the circumstances. In both instances the issue must then be determined as a fact and without reference to any presumption. The unexplained absence will have no greater cogency in determining the issue than the jury think proper, in all the circumstances, to give to it, according to its natural and logical force.

The majority of presumptions arise only as a result of the proof or admission of certain facts. If fact A is the fact in issue, the effect of a presumption will normally be to enable the proponent of the issue to content himself in the first instance with proving facts B and C, which until some rebutting evidence is given, will be held in law equivalent to fact A. But sometimes the fact in issue will be presumed in the proponent's favour before any evidence at all is given. These are the exceptional cases, referred to earlier, in which the evidential burden of a particular issue will rest in the first instance on the opponent of the issue. The presumption of sanity in probate cases well illustrates the operation of presumptions of this kind. The party propounding a will has the fixed burden of proving the sanity of the testator: *Sutton v. Sadler* (1857) 3 C.B.(N.S.) 87. But the Court of Common Pleas in that case did not fail to point out, in the course of a unanimous judgment, that: 'if, indeed, a will not irrational on the face of it, is produced before a jury, and the execution of it proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will'. But, 'when the whole matter is before the jury on evidence given on both sides, they ought not to affirm

that a document is the will of a competent testator, unless they believe that it really is so'. In short, the presumption is, in the absence of any evidence, legally conclusive of the issue; but once some evidence of insanity is adduced, the presumption is discharged, and the proponent asserting sanity must satisfy the jury or fail.

This is but one of the many instances, with which the reports abound, of a jury having been misdirected because the judge of first instance supposed that the presumption with which he was concerned was 'compelling' in its effect. It is submitted that nothing is calculated to lead to greater confusion of legal thought than the idea that presumptions, as such, ever determine the incidence of the fixed burden of proof.

At first sight there is specious support for the proposition that some presumptions are 'compelling'. Thus, for example, the fixed burden of proving guilt is upon a prosecutor; the prisoner is presumed innocent. It is tempting to say that the one is the consequence of the other. But it does not follow that it is so. Innocence, like sanity, is a fact which the law will always presume until some evidence to the contrary is given. It is merely coincidental that the incidence of the fixed burden of proof and the rule of presumption in this case both operate to the same end, namely in requiring that the prosecutor should discharge the initial evidential burden. In that respect, the presumption is redundant. The presumption, as such, has no part in determining the incidence of the fixed burden of proof. This difficulty is recognised by Lord Justice Denning, who thinks the 'probably correct view' to explain the apparently varying effect of the presumption of innocence in different classes of cases is that it is 'in all cases provisional only and that the decisive factor is the legal burden'. No doubt 'presumption of innocence' in criminal cases is often used in a loose sense as expressing the precise converse of the proposition that the prosecutor must prove guilt beyond a reasonable doubt. That may be a convenient phrase, but it is one which we can get along very well without.

But what of the 'compelling presumption' which 'gives rise to a separate issue on which the *legal* burden is on the other side'? By way of illustration, his Lordship thus analyses the presumption in favour of the holder of a bill of exchange.

'For instance, the plaintiff will prove that he is the holder of the bill and that the defendant signed it as acceptor. . . . Those facts are often said to raise a "presumption" or make a "*prima facie*" case, and so they do and of a compelling kind, because from them the court not only *may*, but *must* in law decide the case in favour of the plaintiff unless the defendant makes good a defence such as fraud in the negotiation. . . . That is a separate issue on which the legal burden is on the defendant. If he discharges it, the court *must* in law decide the case in favour of

the defendant unless the plaintiff makes good a reply such as value in good faith subsequent to the fraud.'

Upon a superficial reading, section 30 (2) of the Bills of Exchange Act seems to support this analysis: 'Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill'.

But the construction of these provisions to be collected from the cases decided both before and after the Act is very different.

'If there are any circumstances', said Pollock C.B. in *Hall v. Featherstone* (1858) 3 H. & N. 284 at 286, 'in the nature of fraud or illegality which can be left to the jury, proof of those circumstances by the defendant will cast on the plaintiff the onus of showing that he gave value for the bill. . . . At the trial, I thought that the defendant's evidence was not sufficient to call on the plaintiff to prove consideration, but the case of *Smith v. Braine* (1851) 16 Q.B. 244 establishes this proposition, that if there are any circumstances from which the jury may infer that the plaintiff has not given value for the bill, and he offers no evidence in reply, the facts should be submitted to the jury in support of the plea.'

In *Jones v. Gordon* (1877) 2 App.Cas. 616 the House of Lords expressly left open the question whether such evidence given by the defendant had the same effect to require the plaintiff to satisfy the jury that, when he gave value, he acted in good faith. This question was answered in the affirmative in *Tatam v. Haslar* (1889) 23 Q.B.D. 345. Denman J. said (at p. 348): 'The words of section 30 (2) "if it is admitted or proved" mean no more than that some evidence of circumstances in the nature of fraud must be given sufficient to be left to the jury. That was the old law, as stated in *Hall v. Featherstone*, which has not, I think, been altered by this Act. When, therefore, some sufficient evidence of fraud has been given, as in this case, the onus is on the plaintiff to prove both that he gave value and that he had no notice of the fraud in the sense explained by Lord Blackburn in *Jones v. Gordon*'.

In the light of these cases, the true analysis of the presumption would seem to be this. The plaintiff suing on a bill has the fixed burden of proof of three issues:—

- (1) that he is holder,
- (2) that the defendant is acceptor, and
- (3) that he gave value in good faith.

If he succeeds on (1) and (2), the law will presume (3) in his favour. The defendant, therefore, starts with the evidential burden of issue (3). The defendant leads evidence of fraud, illegality, etc., not in order to establish any separate issue, but as relevant to issue (3). If his evidence is sufficient to submit to the jury, the

presumption is discharged and the plaintiff must discharge the fixed burden or fail. In short, this presumption has the same effect, no more and no less, as any other true presumption.

The presumption of legitimacy, which Lord Justice Denning classifies as 'compelling' is another instance, analogous to the presumption of innocence, of a rule determining the incidence of the fixed burden of proof and a rule of presumption going hand in hand. Here, however, exceptional considerations of policy add a further complication in ordaining that only evidence of non-access by the husband will suffice to bastardise a child born in wedlock: *Gordon v. Gordon* [1903] P. 141. But this again is not the consequence of any peculiar force in the rule of presumption; it is a positive rule of law, which imposes legal paternity upon a husband who has had access to his wife in preference to any paramour with a superior claim in blood. The real fact in issue, therefore, when legitimacy is disputed, is this: did the husband have access to his wife at the material time? This is the fact which the law will presume affirmatively. It may be that in all civil cases the fixed burden of proof will be upon the party alleging non-access, though even this proposition seems, upon the authorities, to be open to dispute. But if this were the one vital issue in a criminal case would the presumption relieve the prosecutor of his duty to prove guilt beyond a reasonable doubt?

It is in the criminal law that the conception of compelling presumptions can most clearly be seen to be mistaken, and here too that its influence is most to be deplored. No one doubts the rule that a man is presumed to intend the natural consequences of his own acts. If A is alleged to have shot and killed B, and his only defence is an alibi, the jury will properly be directed that, if they are satisfied as to the shooting, they must presume it to have been malicious; or, in practice, the judge will not think it necessary expressly to direct them on that point at all; he will in effect withdraw that issue from them, telling them that, if A fired the shot, that was murder. But if A gives evidence in his defence that the shooting was accidental or provoked, the presumption disappears, and the prosecutor must discharge the fixed burden of proving beyond doubt the necessary element of *mens rea*. If the nature of presumptions, such as this, had not been so long and so widely misunderstood, we might be astonished to find a judge, in 1935, directing a jury in these terms:

'Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified.'

The great case of *Woolmington v. D. P. P.* [1935] A.C. 462 has not only finally laid to rest the mistaken idea that this presumption is 'compelling', but has established on a firm foundation the cardinal principle that *every* element of a criminal offence must be proved beyond a reasonable doubt by the prosecution. But even this rule is necessarily subject to statutory exceptions, and the one common law exception in the case of insanity. It remains to examine these and to see if they throw any light on the theory of presumptions.

It is clear that apt words in a statute, defining an offence, can impose upon the accused the fixed burden of proving some matter of excuse or exoneration. But unambiguous words are seldom found. Among the many different devices, to which draftsmen resort, we commonly find that, as against an accused person, a certain matter is to be presumed 'unless the contrary is proved'. Now the word 'prove' suffers from the same ambiguity as the phrase 'burden of proof'. It may mean 'prove by introducing some evidence'—as in section 30 (2) of the Bills of Exchange Act—or it may mean 'prove to the satisfaction of the jury'. *Prima facie*, it might be thought, the word, when it appears in a criminal statute should be so construed as to uphold, rather than reverse, the common law rule affirmed so emphatically by the House of Lords in *Woolmington's Case*. But in *R. v. Carr-Briant* [1943] K.B. 607 the Court of Criminal Appeal said:

'In our judgment, in any case where, either by statute or at common law, some matter is presumed "unless the contrary is proved", the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.'

The particular statutory presumption with which the court was here concerned (Prevention of Corruption Act, 1916, s. 2) is taken by Lord Justice Denning as another instance of a 'compelling' presumption.

In *R. v. Carr-Briant* all that it was necessary for the court to decide was that it was, at all events, wrong to require from the prisoner proof beyond a reasonable doubt. In so far as the sweeping proposition cited above decides more than this, it must be regarded as *obiter*. That the words of the statute might be construed as affecting only the evidential burden of proof does not appear either to have been argued or to have occurred to the court. Yet they had before them, and indeed cited with approval, the judgment of the Court of Criminal Appeal in *R. v. Ward* [1915] 3 K.B. 696.

The court, in that case, had to consider section 58 of the Larceny Act, 1861 (now section 28 of the Act of 1916), whereby it is an

offence for a person to be found by night in possession of an implement of housebreaking 'without lawful excuse (the proof of which shall lie upon such person)'. The appellant was found by night in possession of such implements, but gave evidence that he was a bricklayer, that the implements were tools of his trade, and that he was on his way to work when apprehended. The jury were directed that it was for the appellant to satisfy them that he was rightly in possession of the tools at the time and that he had no unlawful intention. The court did not find it necessary to call on counsel for the appellant to dispute the propriety of this direction. '... the appellant had established *prima facie* that he had a lawful excuse for being in possession of the tools, and the onus was shifted on to the prosecution to prove to the satisfaction of the jury, if they could, from the other circumstances of the case that the appellant was not in possession of the tools for an innocent purpose but for the purpose of housebreaking'.

It is submitted, both on this authority and on principle, that the *dictum* in *R. v. Carr-Briant* cannot be sustained, and that whenever an accused person is required by statute to prove some matter in his defence, in terms which stop short of expressly requiring that he shall satisfy the jury, the effect is merely to relieve the prosecutor of the initial necessity of giving evidence on that issue, but by no means to relieve him of the fixed burden of proof, when the prisoner, by evidence upon the issue, has removed the effect of the presumption. If this be the correct view, the perpetuation of the contrary view under the guise of a 'compelling' presumption is no mere academic cock-shy, but a serious danger to the pure administration of justice. The Legislature, to save unnecessary cost and inconvenience in straightforward cases, enacts that a certain issue may be presumed in favour of the prosecution. But, in another case the whole defence may be directed to that issue alone. To hold that the presumption is compelling is then to require that the prisoner must establish his innocence or be convicted. It is, perhaps, to condemn a man to criminal punishment because the jury are left quite undecided, unable to say on the evidence whether his guilt or his innocence is the more probable.

The unique common law rule that the fixed burden of proof of the defence of insanity is upon the prisoner is so firmly established that only the Legislature could now reverse it. But it is none the less interesting to speculate whether this rule, too, did not spring from the fog of imprecision in which the language and thought of this whole subject have always been shrouded.

When the House of Lords called upon the judges in '*McNaghten's Case* (1843) 10 Cl. & F. 200, to pass upon the subject of insanity in the criminal law, the dissentient Maule J. felt 'great difficulty in answering the questions put by your Lordships on this occasion:—First, because they do not appear to arise out

of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms; so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions: this difficulty is the greater, from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases:—Secondly, because I have heard no argument at your Lordships' bar or elsewhere, on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument:—and Thirdly, from a fear of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials'.

We must remember, too, that in 1843, the modern law of evidence and the criminal law alike were at a rudimentary stage of development. Upon matters of refinement reports of rulings at *Nisi Prius* were often in conflict. Starkie's great treatise on evidence had only just been published. The judges might meet informally to discuss reserved points of criminal law, but the statutory establishment of the Court of Crown Cases Reserved was yet five years hence.

But the difficulties felt by Maule J. did not deter his brethren. In the course of their answers they indelibly impressed upon English law the rule with which we are now familiar 'that the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction'.

We might, in any event, think it curious enough that a jury, doubting the legal capacity of a testator, must reject his will, but doubting the legal capacity of a person accused of crime, must yet convict him. But in another jurisdiction, unembarrassed by the sanctity of the McNaghten Rules, an American judge has vigorously exposed for us the fallacy in the idea of a 'compelling' presumption of sanity in criminal cases.

'Upon whom then must the burden ^{rest} of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle it must rest upon those who affirm that he has committed the crime for which he is indicted. The burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive ground of defence by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to

constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing the crime. This view is not at all inconsistent with the presumption which the law, justified by the general experience of mankind as well as by considerations of public safety, indulges in favour of sanity. If that presumption were not indulged, the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorises the jury to assume at the outset that the accused is criminally responsible for his acts. . . . To hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the satisfaction of the jury, is in effect to require him to establish his innocence by proving that he is not guilty of the crime charged' (*Davis v. U.S.*, 160 U.S. 469, *per* Harlan J. at pp. 485-487; cited Thayer, *op. cit.*, 382).

I must add a word on the subject of conflicting presumptions, which has sometimes been thought to raise theoretical difficulties. Lord Justice Denning justly observes that: 'Any nice discussion on conflicting presumptions is foreign to English law. The preferable approach in such a case would be to recognise that the presumptions are provisional presumptions only which can and should be discarded when they conflict, leaving the issue to be determined by the jury on the facts, the legal burden being in the last resort decisive'.

The question has usually arisen in connection with the bigamy cases and the English law's short answer to it is concisely illustrated in *R. v. Willshire* (1881), 6 Q.B.D. 366. The following is from the judgment of Lord Coleridge C.J. (at p. 369).

'There was a marriage, admitted to be valid, in 1864; there was evidence that the woman then married to the prisoner was alive in 1868. In 1879, the prisoner went through the ceremony of marriage with another woman'—(the validity of which was necessary to support the charge of bigamy in 1880). 'It is said, and I think rightly, that there is a presumption in favour of the validity of this latter marriage, but the prisoner showed that there was a valid marriage in 1864, and that the woman he then married was alive in 1868. He thus set up the existence of a life in 1868, which, in the absence of any evidence to the contrary will be presumed to have continued to 1879. It is urged, in effect, that the

presumption in favour of innocence, a presumption which goes to establish the validity of the marriage of 1879, rebuts the presumption in favour of duration of life. It is sufficient to raise a question of fact for the jury to determine. It was for the jury to decide whether the man told and acted a falsehood for the purpose of marrying in 1879, or whether his real wife was then dead. The Common Serjeant did not leave the question to the jury, but on these conflicting presumptions held that the burden of proof was on the prisoner, who was bound to adduce other or further evidence of the existence of his wife in 1879; thus withdrawing from the jury the determination of the fact from these conflicting presumptions. I am clearly of opinion that in this the learned common serjeant went beyond the rules of law. The prisoner was only bound to set up the life; it was for the prosecution to prove his guilt.'

The result then is, indeed, that the conflicting presumptions are discarded. But if they are merely provisional, *ex hypothesi* they might equally have been discarded when standing alone. If on the other hand, we introduce 'compelling' presumptions into the conflict, the theoretical difficulties become formidable, and sooner or later we shall fall into the error of the learned common serjeant in *R. v. Willshire*.

But on the theory of presumptions, for which I have here contended, there is, I think, no difficulty. The proponent of the issue (here the prosecutor) starts with a presumption in his favour (the validity of the marriage of 1879 is presumed). The evidential burden is therefore cast upon the prisoner. He introduces evidence (the valid marriage of 1864, and survival of the wife to 1868) which is 'sufficient to raise a question of fact for the jury', *i.e.*, to discharge the presumption. This evidence, if it stood alone, would also have a presumptive effect. But it does not stand alone. The latter presumption, therefore, never arises, and the issue must be determined by the jury on all the evidence.

So, whenever there is an apparent conflict of presumptions, each presumption, or the evidence out of which it arises, affords the necessary *prima facie* answer to the other.

NIGEL BRIDGE.

SOME ASPECTS OF MARRIAGE AND DIVORCE LAWS IN SOVIET RUSSIA

BEFORE dealing with the marriage and divorce laws of Soviet Russia it is important for the better understanding of this legislation and of its background to say a few words on Russian pre-revolutionary laws on the same subjects.

The fundamental principle of these laws was that they were based on the religious laws of the various inhabitants of Russia, of which the Orthodox faith was the predominant, enjoying the privileges of State religion.

The various conditions of capacity and of legality of marriages were laid down in the civil laws but most of them were of canonical origin and what is even more important only marriages solemnised by the Church in accordance with the religious laws of the parties were recognised by law and no form of civil marriage was known. Several restrictions on marriages between persons belonging to different religions were imposed.

The same canonical considerations were applied to divorce. No civil court had jurisdiction in divorce and it was the ecclesiastical tribunals of various religions practised on the territory of Russia which were entrusted with the power to dissolve marriages. Therefore the possibility of obtaining a divorce varied in accordance with the religious beliefs of the parties.

The chief grounds for divorce of Orthodox marriages were adultery and incapacity and also convictions for penal offences with deprivation of civil rights, unknown absence for over five years and the decision of the spouses to take holy orders and the veil. Roman Catholic marriages could not be dissolved in Russia at all, apart from cases of incapacity, when the marriage could be held void and annulled. Marriages between Lutherans, Anglicans, Calvinists, etc., could be dissolved on quite a number of grounds, it suffices to say that in addition to adultery and incapacity, incurable diseases, insanity, sexual perversion, malicious desertion, etc., served as such grounds. Divorces of Jews and Moslems were also regulated by their religious laws and were granted for a variety of reasons.

Property relations between husband and wife were based in pre-revolutionary law on the principle of complete separation of property, each spouse keeping all his separate property rights and being entirely independent from the other in his or her property relations.

On November 7, 1917, the Soviet Government came into power. Its advent was characterised by an immediate and radical alteration

of the whole social structure of the State achieved by publication within a short time of a number of Decrees affecting most fundamentally various spheres of social and economic life.

The first Soviet laws affecting marriage and divorce were two Decrees, one, published on December 19, 1917, on divorce, and the other published on December 20, 1917, on civil marriage, children and the keeping of registers of Civil Status.

In complete reversal of the principle of religious marriages the first words of the new Decree on marriage are: 'The Russian Republic in future will recognise only civil marriages', and it is further stated in a note that 'religious marriages solemnised concurrently with the obligatory civil marriage are now a purely private concern of the parties'. It is to be observed that only marriages registered with special Departments of Civil Status created for this purpose were recognised. Children born out of wedlock were granted in every respect the same rights as legitimate children.

Not less radical was the change in the divorce laws. It was the local civil courts who were now entrusted with divorce jurisdiction and a marriage could be dissolved by mutual consent of the spouses or at the request of one of them. In cases of mutual consent the court procedure could be eliminated by filing a declaration of such desire directly with the Department of Civil Status where the marriage was registered and where the divorce would also be registered.

No grounds for divorce were indicated in the Decree and mutual consent, or even the desire of one of the parties to dissolve the marriage, was sufficient for the court to have the marriage dissolved.

A further more elaborate Decree under the title of Code of Laws dealing with marriages, divorce and civil status was published in 1918. In substance this Code differs very little from the previous Decrees. The provision of the validity only of civil (secular) marriages registered in the Registration Departments of Civil Status as opposed to religious marriages which have in themselves no legal effect formed the basis of the new Code. The only exception is a safeguarding clause validating all religious marriages solemnised in accordance with the provisions of pre-revolutionary law before December 20, 1917 (the date of the first Soviet marriage Decree). Elaborate provisions were made about the Registration Departments and the procedure of registration. Conditions of marriage capacity and of nullity of marriage were laid down. The marriageable age for women was fixed at sixteen years and for men at eighteen years. To belong to a monastic order was no longer an impediment to marriage. Marriages between direct ascendants and decendants and between brothers and sisters were prohibited. Different religious beliefs no longer served as obstacles to marriage. Rights of property of the parties were not affected by marriage. Children born out of wedlock continued to enjoy the same rights as

legitimate children as first provided in the Decree of December 20, 1917.

Provisions for divorces followed in the main those laid down in the Decree of December 19, 1917. The consent of both spouses or the desire of one of them to dissolve the marriage continued to be sufficient ground for divorce. In case of mutual consent the matter could be disposed of by a declaration filed by the parties with the Department of Civil Status where their marriage was registered, where the dissolution was also registered and an appropriate certificate issued. If only one spouse applied for a divorce the matter was dealt with by the local court and the other spouse was summoned to appear. As no grounds for divorce other than the desire of both or even of one party were mentioned in the law, and, therefore, no other ground were required the procedure in court was purely formal.

The provisions of the Soviet Code as to divorce were fully discussed in this country in the case of *Nachimson v. Nachimson* [1930] P. 217. Professor Cheshire in his book *Private International Law*, 3rd ed., 1947, on p. 399 thus summarises the position: 'The issue, which arose in a suit for judicial separation, was whether a marriage, contracted at Moscow between two domiciled Russians according to Russian law, constituted a marriage in the eyes of English law. Russian law until it was altered in 1944, regarded a marriage as terminable at the will of either party. If both parties desired a divorce they were entitled to demand that the appropriate official should register the dissolution of their marriage. If one of the spouses desired a divorce against the wishes of the other, legal proceedings had to be instituted in court, but even so it was the duty of the judge to pronounce a decree of dissolution, provided that the wishes of the petitioner were formally declared'.

Even the radical provisions of the Soviet Code of 1918 did not for long satisfy the Soviet legislators and in 1926 a new Code of Marriage Laws was enacted. On the matters of marriage and divorce the provisions of this Code in comparison with the Code of 1918 differed in two material aspects. With regard to marriage the necessity of obligatory registration was done away with and unregistered cohabitation created the same consequences as a marriage properly registered with the Departments of Civil Status. Registration continued to be regarded as in the interests of the State and of the parties and provided undisputed evidence of marriage, but ceased to be a condition of marriage. With regard to divorce, even the formal hearing of a divorce case in court, when only one of the parties was asking for it, was no longer required and the whole question of dissolution became a matter of simple registration with the Departments of Civil Status. The marriage age for both parties was raised to eighteen years. The property relations of the spouses were altered in the sense that whereas pre-nuptial property of the spouses continued to be

separate, all property acquired during the marriage became the joint property of the spouses.

One of the Soviet law commentators, Mr. Raevitch, in his article on Marriage Law in the Treaty on Foundations of Soviet Law published in Moscow in 1929 justifies all the above changes in marriage and divorce laws as a logical development of the Soviet system of law. He is of the opinion that an unregistered marriage based purely on factual relationship must have the same protection as the registered form of marriage which in his view was retained in the previous Code only in order to fight the old religious forms of marriage and insist on the participation of secular authority in the celebration of matrimony. By 1926 such safeguards against the desire for taking advantage of religious forms were no longer necessary. The minimising of formalities for divorce was also hailed as progress. In pre-revolutionary times, the commentator emphasises, marriage was like a cage into which it was very easy to enter, but out of which it was very difficult to escape. The Codes of 1918 and particularly the one of 1926 have radically changed all that and the Code of 1926 has altogether done away with the necessity of any court procedure for divorce.

The pendulum has reached its furthestmost swing and having stayed in this position for several years is now gradually but persistently swinging back.

The first sign of the change was the law of 1936 prohibiting abortions, increasing help and assistance to expectant mothers and introducing certain changes in the law of divorce.

The Soviet State in anticipation of war became interested in increasing its population and found it necessary to revise completely its legislation concerning the right of abortions. At the same time a slight step back was made in the facilities for divorce in order, as the legislator puts it, 'to fight a lighthearted attitude to the family and family duties'. Both parties had to be summoned to the Department of Civil Status where divorces were being registered and a note about the divorce had to be inserted in the passport. Divorce registration fees were raised and the second divorce cost more than the first, and the third and subsequent divorces more than the second.

These new measures were not very serious in themselves, but they were the signs of changing times. It took a few more years for further steps in the backward direction to take place. By a decree of the Præsidium of the Supreme Council of the U.S.S.R. of July 8, 1944, only marriages which were registered created mutual rights between the spouses with regard to joint property, to property acquired during marriage, as well as to alimony, etc. We observe a wedge being driven between registered and unregistered marriages and the Decree encourages those who live in an unregistered marriage relationship to register their marriage now with indication for how long their *de facto* cohabitation was

existing. Spouses of unregistered marriages whose husbands or wives perished during the war were protected and by special Decree of November 10, 1944, facilities were given to them to get a declaration of marriage even in the cases of the preceding death of one of the parties. Lastly, in the new amended edition of the Marriage Code, Article 1 contained the following new paragraph: 'Only registered marriage creates the rights and duties of spouses provided for by the present Code (Decree of the Præsidium of the Supreme Council of R.F.S.R. of April 16, 1945)' and Article 3 which dealt with unregistered marriages was deleted.

The unregistered marriage hailed in 1926 as a progressive step was done away with and the necessity for registration was now welcomed as a measure strengthening the bonds of the Soviet family.

The same tendency to strengthen the bonds of the Soviet family was now claimed as a reason for the changes in the divorce laws which were made by the Decree of the Præsidium of the Supreme Soviet of U.S.S.R. of July 8, 1944, and incorporated in the new amended editions of the Marriage Code. It was no longer possible to get divorced by mutual consent of the parties or even by the desire of one of them by the mere registration of the fact with the Department of Acts of Civil Status. An elaborate court procedure was now established. First, it was necessary to file with the People's Court a declaration expressing the desire to have the marriage dissolved and stating motives of such desire. This declaration had to be accompanied by a payment of a fee of 100 roubles; secondly, before the case came on for hearing, the other spouse had to be summoned to the court and notified about the declaration and of its motives and lists of the witnesses who would be called had to be established, and thirdly, a notice in the local newspaper about the intended divorce had to be inserted and paid for by the party who sought the divorce. The People's Court at its hearing had it as its duty to specify the motives which were the cause of the petition for divorce and to take measures for reconciliation of the spouses; if the People's Court failed to achieve this the procedure before it closed and the petitioner, if he so desired, had to apply with his petition to a higher court.

It is to be observed that the law does not enumerate causes for divorce, the existence of which would make it a duty for the superior courts to grant a divorce. Apparently when the motives of the petition have been specified by the People's Court, it remains in the discretion of the superior court to grant the divorce or not. This being so, the factual operation of the divorce law will greatly depend on the current political tendencies and how far the desire to strengthen the bonds of Soviet family will go. It is not impossible to foresee a situation when the cage of Soviet marriage will have even less exits than the so much deprecated cage of pre-revolutionary marriage, because then there were few, but at least

definite, grounds when dissolution of marriage had to follow as of right, and now there are none. It is true that in the previous Soviet laws on divorce also no causes for dissolution were laid down, but there the overriding idea was that the will for dissolution of both and even of one party was in itself sufficient ground for divorce. This was definitely proclaimed in Article 18 of the Marriage Code. This conception is absent from the new law, the amended Article 18 does not contain this provision, but stresses the necessity of court proceedings. The lower tribunal cannot do more than specify the motives of the divorce petition and it is for the higher tribunal to deal with the substance of the petition and in the absence of any other indications in the law, in its absolute discretion.

In an article on Soviet divorce practice first published in *Sovietskoe Gosudarstvo i Pravo*, 1946, No. 7, and later appearing in an English translation in *The Modern Law Review*, April, 1948, Mr. G. M. Sverdlov a Soviet commentator confirms that with regard to divorces 'The discretion of the court is the principal substantive alteration introduced by the Decree', that the 'Soviet State is striving to reinforce family ties' and that 'In contrast to foreign legislation the Decree does not define the grounds for divorce. It empowers the court in all cases to consider the reasons put forward in the actual circumstances of each individual case'. Mr. Sverdlov states that he has examined judgments in about 400 cases and although he admits that it would be wrong to expect from these cases a comprehensive picture of the principles which are being formulated by judicial practice he indicates certain trends in the decisions, of which the most important is that so far mutual agreement proved to be without exception sufficient ground for divorce. However, it ought to be borne in mind that in Soviet Russia, like in many other continental countries and unlike our system of legal precedents, previous decisions of even superior courts are not binding on the courts in later cases, and, therefore, there is nothing to prevent a Soviet court tomorrow to refuse a divorce to parties on grounds identical with those in a previous case when a decree of divorce was granted.

The absence of definition of grounds for divorce in the Decree to which we drew attention and which is confirmed by Mr. Sverdlov is, therefore, in our view an unsatisfactory feature of the new law, which can in certain circumstances become a real hardship for the parties concerned.

Apart from and in addition to these new difficulties on the road to divorce, the costs of divorces which have been granted are high and payments by one or both spouses from 500 to 2,000 roubles must be made.

On February 15, 1947, the Præsidium of the Supreme Soviet of the U.S.S.R. passed a Decree prohibiting marriages between citizens of the U.S.S.R. and foreigners.

It is of interest to mention this Decree because it shows that the whole sphere of marriage laws is at present in a transitory state, greatly influenced by conditions created by the war and its aftermath.

On the one hand the colossal losses in men and women resulting from the war induce the Soviet legislator to pass measures which, in their view, will strengthen the family bonds and will increase the rate of childbirth. To this category belong the already cited law of prohibition of abortion and the Decree of July 8, 1944, of increased help to expectant mothers, increased protection of mothers and children and the creation by this Decree of the title 'Heroine-Mother' and the orders of 'Motherhood-Glory' and medals of 'Motherhood' to be granted to mothers of large families, as well as the imposition of special taxes on bachelors and on childless families and on families with a small number of children.

On the other hand the present political considerations make possible the passing of such an extraordinary Decree as the one prohibiting marriages between Soviet citizens and citizens of the whole world outside the U.S.S.R.

It is difficult to foresee in what direction Soviet family law will move; will it retain some of the healthier features of the new trend, as for instance the requirement that all marriages should be registered, and discard the arbitrary elements which we now find in it? It is to be expected, however, that before long it will further evolve reflecting in its further changes the general development of the country and of its life.

M. M. WOLFF.

DELEGATED LEGISLATION—SOME RECENT DEVELOPMENTS

IN this paper the principal developments discussed are the work of the Select Committee of the House of Commons on Statutory Instruments, and the growth of the consultative method with particular reference to the National Insurance Advisory Committee.

1. *The Select Committee on Statutory Instruments.*

Statutory instruments can be regarded from two standpoints. First, their likely effect may be looked at, and examination is then directed to their merits to see if their provisions are desirable. Secondly, they may be considered as the formal results of the delegated power, in which case the question is whether they are the type of instrument which the Legislature intended or expected to emerge. From either of these standpoints Members may speak when the instrument has been laid before Parliament.¹ It is sometimes argued that this laying is ineffective; this generally seems to mean that too few instruments are examined as to their merits and derives more from a dislike of governmental 'interference' than from a fear that the substance of the instrument does not reflect the intention of the parent Act. The most cogent of the reasons for the delegation of the power to legislate is the shortage of Parliamentary time, and the requirement that Parliament should reconsider the merits and policy of any large number of instruments defeats the purpose of delegation. The policy of the parent Act has been debated; so have the principles of its sections; interests affected by the Act have been consulted, their representations considered, amendments made and final decisions taken by the Government. The point was made most clearly by a Government Department to the Donoughmore Committee; in a memorandum the Ministry of Transport stated: 'Unless Parliamentary approval is to be accorded in a way which might be regarded as perfunctory, it would be difficult, even if it were possible, to avoid a reopening of the whole merits of the various provisions contained in the Rules and Orders submitted'.² It is therefore right that only on rare occasions should the merits and policy form the basis of a prayer for annulment or the opposition to an affirmative resolution.

In the House of Lords, those instruments which require affirmative resolutions are referred to the Special Orders Committee, which decides, if the order is of the nature of a public Bill, whether there should be a debate and, if the order is of the nature of a private or

¹ Though not so as to debate afresh the policy of the parent Act.

² *Minutes*, p. 268 (6).

hybrid Bill, whether it should, because of the petitions laid against it, be considered by a Select Committee. The question of shortage of time which so determines the attitude of the House of Commons scarcely arises in the House of Lords.

The Select Committee regards the formal or constitutional aspects. The Committee was first appointed in 1944,³ after a debate in that year,⁴ to consider every statutory instrument laid or laid in draft before the House of Commons, upon which proceedings might be taken in either House in pursuance of any Act of Parliament, with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds: that it imposes charges, is not open to challenge in the courts, appears to make unusual or unexpected use of the powers conferred, purports to have retrospective effect where the parent statute confers no such express authority,⁵ that there has been unjustifiable delay in publication or in the laying before Parliament or in notifying the Speaker in accordance with section 4 (1) of the Statutory Instruments Act, 1946,⁶ or that for any special reason its form or purport calls for elucidation. The powers of the Committee include the requiring of written or oral explanation from Government Departments and the reporting to the House of this explanation; before drawing the attention of the House to any instrument, the Committee must give departments an opportunity for such explanation. This order of reference gives the Committee no power to inquire into the merits of an instrument.

Sir Gilbert Campion (then Clerk of the House of Commons) made two proposals to the recent Select Committee on Procedure, which would have greatly extended the powers of the Statutory Instruments Committee, and which serve to show its present function. The first proposal was that the latter Committee should examine every statutory instrument which is subject to annulment and be empowered to report on its merits, as an exercise of the powers delegated. Sir Gilbert admitted that the merits and policy of the parent Act should not be discussed, and recognised that the distinction might be difficult to maintain.⁷ None of the other witnesses supported this proposal. The principal objections were two: first, that it would divide the Select Committee on party lines and, secondly, that it would add so greatly to the work of the Committee as to prevent it functioning at all. This latter objection was particularly stressed by Sir Charles MacAndrew as Chairman, and by Sir Cecil Carr as Assistant to the Statutory Instruments Committee.⁸ The Government rejected the proposal on the ground that

³ 401 H.C. Deb. 5 s., cols. 310-11.

⁴ 400 H.C. Deb. 5 s., cols. 202-99.

⁵ Added in 1946.

⁶ Added in 1948.

⁷ Third Report of Select Committee on Procedure (*Appendix to Report*, para. 30 (1)), H.C. 189-1 of 1946.

⁸ H.C. 189-1 of 1946, para. 4621.

it would mean Ministers attending before the Committee to defend the policy embodied in the instruments.⁹ The Clerk of the House in answer pointed out that the merits of an instrument, *as an exercise of the powers delegated*, were not the same as the policy of the instrument or of the parent Act. In the normal type of delegated legislation, where the limits of the power are clearly defined, the merits of an instrument, in his view, consisted in its effectiveness in carrying out an accepted policy without unnecessary interference with the rights of the public.¹⁰ But this does not seem to meet the criticisms for, if the Committee is to be enabled to report that an instrument is not effective in carrying out the policy of the Act (a decision which would be very difficult to make before there had been experience of its practical working), Parliament is attempting to instruct the Executive how best to govern and to suggest, inevitably, alternative lines of detailed administration. Such is not and cannot be a Parliamentary function. The second proposal was that the Select Committee should have power to inquire into and report on any grievances arising out of instruments actually in operation.¹¹ Again, this proposal received no support. It was not clear how it could be tackled at all, but there was agreement that this Committee was not the proper organ. Sir Gilbert later explained that what he had meant was that the Committee should inquire not into the grievances themselves but into the operation of instruments which had been the subject of reasonable complaint.¹² The opinion has indeed often been expressed that the methods whereby complaints can be made by Members of Parliament against particular administrative action are inadequate. In their Third Report, the Select Committee on Procedure in 1946 said of both Sir Gilbert Campion's proposals that they 'would go some way to supplement the inadequate and unsatisfactory opportunities which the House at present possesses for exercising its control over one aspect of administration', but they preferred to recommend the setting up of another Select Committee to inquire into the delegation of legislative power generally.¹³ The Government, however, has declined to support this recommendation at the present time.¹⁴ It would seem both impossible and inappropriate for one Committee to deal with complaints arising on all the subjects dealt with by statutory instruments. The alternative which has been constantly advocated is the setting up of committees of members attached to departments. There is, however, a serious objection to this. Criticism of policy and the making of complaints are proper functions for Parliament to which Ministers are responsible and

⁹ H.C. 189-1 of 1946, para. 3180 (12).

¹⁰ *Ibid.*, para. 5719 (39)-(40).

¹¹ *Ibid.* (*Appendix to Report*, para. 30 (2)).

¹² *Ibid.*, para. 5719 (42)-(46).

¹³ *Ibid.* (*Report*, para. 30).

¹⁴ 443 H.C. Deb. 5 s., cols. 1557-8.

where, if they are not quickly to lose their reputations, they must adequately defend themselves. But it is the duty of the Government to govern, and departments must be run by Ministers, not Parliamentary Committees. As Sir Cecil Carr has stated: 'The proposal may be said to involve a more definite intrusion by the Legislature into the daily routine of administering the government of the country than has hitherto been undertaken. . . . When the question of committees sitting attached to all the different departments has been proposed in the past . . . there were witnesses who thought that a committee of the House should actually sit inside the department because all the material would be there. . . . It seems to me a remarkable constitutional innovation that Members of the House of Commons should invade Whitehall. The House might not welcome reciprocity on those lines'.¹⁵ Sir Gilbert Campion himself has pointed out the difference between the present powers of the Statutory Instruments Committee and the powers which it would have if his proposals were adopted. The present Committee, in his words, 'is looking at the formal aspects and I am thinking of something which would look more at the instrument itself'.¹⁶

Nevertheless, the Committee's terms of reference are not narrow. The duty to draw the attention of the House to an instrument which 'appears to make some unusual or unexpected use of the powers conferred' has been called by the Member who in 1944 moved that the Committee be set up, 'a most original and brilliant piece of draughtsmanship'. He adds: 'It is not desirable that a minority in Parliament which has failed to defeat the Act establishing the policy should be encouraged to oppose the statutory instrument giving effect to the policy. What should however be provided against is that a Minister should be able to use his powers in a way not contemplated by Parliament'.¹⁷ Similarly, the Lord President of the Council has said: 'What is important is that the subordinate legislation should not go outside the authority given by Parliament. That is the great thing that has to be watched'.¹⁸ The function of the Committee has been thus described by its Chairman: 'If Members of Parliament were all perfect and able to do an inestimable amount of work, they would read all [the statutory instruments] through themselves and, if they desired, they could put down a prayer against any particular one but to save them doing that, this Committee is set up. Our function is to go through them and report to the House for their action if we think there is anything unexpected or any unjustifiable delay or something that calls for elucidation'.¹⁹ The Committee as such never makes an

¹⁵ H.C. 189-1 of 1946, paras. 4621 (4), 4677, 4716.

¹⁶ *Ibid.*, para. 6067.

¹⁷ Mr. Hugh Molson, M.P., *Delegated Legislation* (Hansard Society Pamphlet), p. 8.

¹⁸ H.C. 189-1 of 1946, para. 3679.

¹⁹ *Ibid.*, para. 4704 (Sir Charles MacAndrew).

official 'prayer' in the House, although Members of the Committee are free to do so.²⁰

The distinction made by the Committee between examination of the merits and policy of an instrument and the decision that an unusual or unexpected use has been made of the power to legislate has been exemplified by Sir Cecil Carr: 'The line taken from the beginning has been: if you have a price-fixing order for potatoes . . . and the price goes up 2d. or down 2d., that is policy and merits, but, if you found it went up suddenly by 10s., that was something you might regard as an unusual or unexpected use of the power'.²¹

From its first sitting until the end of the 1947-8 session the Committee examined approximately 3,200 instruments and submitted 52 routine and 8 special reports to the House. It has drawn the attention of the House to 16 instruments which appeared to make an unusual or unexpected use of the powers conferred. Two examples may be given. The first was one of the type suggested by Sir Cecil Carr in the example quoted above. Under the Raw Cocoa (Control and Maximum Prices) (Amendment) Order, 1947,²² the price of raw cocoa to manufacturers in this country was raised from 51s. to 119s. per hundredweight, and the Ministry of Food sent a senior official to the Committee to explain the reason for the increase. The Ministry's buying price, it appeared from his evidence, was determined by the world price following the New York market price, which had soared when America removed controls. Questions were asked to ascertain to whom the additional money went, and the Government's policy to the African native was discussed. Presumably, however, whatever explanation had been given, the Committee would have drawn the attention of the House to the instrument, since it was of opinion that the power delegated was meant to enable the Minister to vary within narrow limits the controlled price of raw cocoa, not to double the price at one stroke. Some of the questions very closely approached the merits and policy of the action. One Member suggested that it might have been fairer to the public if the price had been gradually increased, and that the Colonial Office might have seen to it that the profit went back to the growers for the improvement of the plantations.²³ The giving of an explanation to the Committee by a departmental official both clarifies the issue and saves time, enabling criticism in the House to be relevant and informed. Equally desirable are questions for the elucidation of the explanation. But implied or expressed criticism of the policy and merits of the instrument fall, it is submitted, outside the Committee's terms of reference and should be addressed to the responsible Minister in

²⁰ H.C. 189-1 of 1946, paras. 4719-21.

²¹ *Ibid.*, para. 4669.

²² S.R. & O., 1947, No. 552.

²³ H.C. 141 of 1946-7 (Minutes of Evidence, paras. 16-18, 23).

the House itself. The second example concerns the Seizure of Food Order, 1948.²⁴ This Order provided for the seizure and sale of any article of food in respect of which an offence against Regulations 55 and 55AB of the Defence (General) Regulations had been or was believed to have been committed. In addition it authorised the deduction of expenses incurred by or on behalf of the Minister whether conviction or acquittal of the accused ensued. The proceeds of sale, less these expenses and subject to certain directions which might be made by the courts, were to be returned to the owner. The Committee particularly requested to be informed of the statutory provision which authorised the deduction of expenses. The Ministry of Food sent a memorandum to the Committee first pointing out that the Defence Regulations gave power to the Minister when making the Order to provide for 'any incidental and supplementary matters' which he thought 'expedient for the purposes of the Order to provide', and secondly, claiming that 'the deduction of expenses is only reasonable to ensure that the Ministry is not involved in financial loss through the handling of property which may be that of a person who has been convicted of a serious offence' or where the offence is believed to have been committed. In practice, the department stated, no deduction of expenses was made where a person was acquitted.²⁵ The Parliamentary Secretary to the Ministry of Food had given an undertaking in the House that the Order would be amended to provide that no expenses should be deducted where no conviction was obtained.²⁶ In addition, the question of the *vires* of the provision for the deduction of expenses was referred to the Solicitor-General for his opinion.²⁷ In this example, opposition to the Order had already been voiced in the House when the Committee first examined it. This also happened in the case of the Registration for Employment Order, 1947²⁸ (the 'spivs and drones' Order). This reversal of the usual procedure does not make the Committee's examination in any way superfluous; in the Committee, Members may question the Ministry's senior officials on certain aspects of the instrument; in the House, they cannot. So long as the officials are not questioned on the policy and merits, the responsibility of the Minister is not impaired.

The Committee has drawn the attention of the House to seven instruments the form or purport of which called for elucidation, and to thirty-two instruments where the publication or laying before Parliament appeared to have been unjustifiably delayed. In 1946 the Committee expressed strongly their disapproval of instruments

²⁴ SI 1948, No. 724.

²⁵ H.C. 201 of 1947-8 (Seventh Report, Appendix II).

²⁶ 449 H.C. Deb. 5 s., col. 2141. The amending Order (SI 1948, No. 953) deletes reference to expenses entirely. And see 449 H.C. Deb. 5 s., cols. 53, 2134-46.

²⁷ H.C. 201 of 1947-8 (Seventh Report, Appendix II, para. 4).

²⁸ S.R. & O., 1947, No. 2049 (and see H.C. 201 of 1947-8, Second Report and Minutes of Evidence).

which purported to have retrospective effect although there was no express statutory authority for this²⁹; as a result, the power of drawing the attention of the House to such instruments was added to the terms of reference and has been used on one occasion.³⁰ ✓ The Committee has not discovered any instrument which imposes a charge within the meaning of the first head of reference or which is made in pursuance of an enactment containing specific provisions excluding it from challenge in the courts (the second head). The total number of instruments, therefore, to which the attention of the House has been drawn by the Committee up to the end of the 1947-48 session is fifty-five. This means that the Committee thought that an unusual or unexpected use of the power had been made, or that the form or purport of the instrument required elucidation, or that the instrument had retrospective effect without express authority, in less than one per cent. of all those examined. The total number of instruments registered is of course far greater than the number examined. A scrutiny of the instruments registered under the numbers 1-200 for 1948 shows that only seventy-one of these were examined by the Committee. Of the remainder, ✓ seventy-two were not published by the Stationery Office for sale to the general public; there are broadly four categories in this group³¹: first, local instruments; second, any general instrument certified by the Minister concerned to be of a class of documents which is or will be otherwise printed as a series and made available to the persons affected; third, temporary instruments; fourth, instruments the printing and sale of which would be 'contrary to the public interest' in the opinion of the Minister concerned.³² ✕ Again, forty-seven of the 200 were not required by the parent Act to be laid before Parliament; these include orders under the Wages Councils Act, 1945, the Requisitioned Land and War Works Act, 1945, the Trading with the Enemy Act, 1939, and eighteen other statutes. A further seven were laid but were not examined because no provision had been made rendering them subject to Parliamentary proceedings.

Indirectly and through Special Reports, the Committee has had considerable influence. The Seventh Report of the 1945-6 session Committee drew attention to thirteen instruments the publication or laying before Parliament of which appeared to have been unjustifiably delayed; its Ninth Report listed seven more; the Tenth to Fourteenth totalled another seven; none appeared in the Fifteenth to Twenty-first Reports.³³ In the whole of the 1946-7 session, the

²⁹ H.C. 187 of 1945-6 (Second Special Report, para. 3).

³⁰ Leather (Charges) (No. 1) Order, 1947 (S. R. & O., 1947, No. 2800). See H.C. 201 of 1947-8 (Fifth Report and Appendix).

³¹ SI 1948, No. 1, regs. 5, 6, 8.

³² The great majority fell under the first category; to date, no SI has been withheld under reg. 8 (the fourth category).

³³ H.C. 187 of 1945-6.

attention of the House was drawn to two such instruments³⁴ and to only one in the 1947-8 session.³⁵ The need for consolidation of over-amended instruments has been urged³⁶; so has the desirability of descriptive short titles.³⁷ The issue of explanatory notes was welcomed by the Committee. It cited the following instrument: 'The Laundry (Control) Order, 1942, as amended by the Laundry (Control) (No. 2) Order, 1942, shall have effect as if sub-paragraph (3) of paragraph 2 were omitted and the Laundry (Control) (No. 2) Order, 1942 is hereby revoked'. The Committee commented: 'To that unilluminating provision the following explanatory note is added: "The effect of this Order is that a launderer is no longer required to give notice to the Board of Trade if he intends to close down his business either temporarily or permanently".' The Committee suggested that the explanatory note might have been placed, with advantage, in the forefront of the Order itself.³⁸ Sub-delegation has also been the object of the Committee's attentions,³⁹ and concern is expressed 'over the difficulty of knowing in each case whether the directions, requirements or other details will or will not take the form of statutory instruments and whether they will or will not escape any provision in the parent statute which would cause them to be laid before the House and be subject to annulment on motion.'⁴⁰ In 1944, the Committee referred to 'the apparent absence of any principle determining the choice between the procedure by affirmative resolution and the procedure for annulment of rules and orders by adverse prayer'.⁴¹ In 1947 the Committee again drew attention to the need of 'some considered formula',⁴² but the Lord President of the Council answering a question in the House refused to lay down any rules and attempted to pass the responsibility on to Parliament 'because the Bill comes before Parliament and Parliament can argue the point and decide it'.⁴³ This idea that Parliament is the appropriate body to decide such matters, rather than the draftsmen under the guidance of Ministers and officials, is merely playing with constitutional phraseology and is presumably not intended as a serious contribution. One additional power must be noted. Under the Statutory Instruments Act, 1946, instruments may, exceptionally, be laid after becoming operative. To avoid criticisms similar to those directed against Provisional Rules under the Rules

³⁴ H.C. 141 of 1946-7 (Second and Sixth Reports).

³⁵ H.C. 201 of 1947-8 (Eighth Report).

³⁶ H.C. 187 of 1945-6 (Second Special Report, para. 4); H.C. 141 of 1946-7 (Special Report, para. 4); H.C. 201 of 1947-8 (Special Report, para. 10).

³⁷ H.C. 187 of 1945-6 (Second Special Report, para. 5, and Third Special Report, paras. 11-15); H.C. 201 of 1947-8 (Special Report, para. 9).

³⁸ H.C. 187 of 1945-6 (Third Special Report, paras. 7-10).

³⁹ *Ibid.*, para. 16.

⁴⁰ H.C. 201 of 1947-8 (Special Report, para. 3).

⁴¹ H.C. 113 of 1943-4 (Special Report, para. 4).

⁴² H.C. 141 of 1946-7 (Special Report, paras. 5-6).

⁴³ 443 H.C. Deb. 5 s, cols. 1830-1.

Publication Act, 1893, the Speaker of the House of Commons must be notified of any such instruments.⁴⁴ The Select Committee has been empowered to consider any of these notifications,⁴⁵ and, as we have noted, to draw the attention of the House to cases of unjustifiable delay in notifying the Speaker.

The idea of a Select Committee operating in this way was generally opposed as impracticable before it was tried. Sir Arthur Robinson, Secretary to the Ministry of Health in 1931, failed to see how it could avoid going into the question of merits.⁴⁶ Sir Ivor Jennings considered that the task would be impossible and that Members could not be found to undertake it.⁴⁷ On the other hand, the Donoughmore Committee recommended a Standing Committee to be established in each House with the duty of scrutinising not only the regulations but also every Bill containing proposals for conferring legislative powers on Ministers.⁴⁸ Dr. C. K. Allen has recently revived this latter recommendation.⁴⁹

To sum up: the amount of work, most of it drudgery, which is done by the Committee with the assistance of Sir Cecil Carr⁵⁰ is considerable. The value and importance of this work are undeniable. The very existence of the Committee must prevent more shortcomings than the Committee detects; unjustifiable delay in publication and laying before Parliament has almost ceased; the intelligibility of statutory instruments has slightly increased. Old practices and new developments are quickly noted and, where necessary, watched. For good, well-planned administration in the modern State, the Government must possess considerable legislative and judicial (in addition to executive) powers. The greater the power, the greater the need to ensure that it is used only for the purpose and in the way authorised. Moreover, misapplied power is not only dangerous, it is also wasteful. The fear is that the Select Committee will be swamped and forced to be less thorough. In the 1946-7 session, 795 instruments were examined. In the 1947-8 session, the figure was 1189. Under the Statutory Instruments Act, 1946, the effect of which is only now beginning to be felt, not only those instruments made but also those confirmed or approved by a Minister and required to be laid before Parliament, now come before the Committee.⁵¹ More than half of the instruments

⁴⁴ S. 4 (1).

⁴⁵ 445 H.C. Deb. 5 s, cols. 1824-5 (December 17, 1947).

⁴⁶ Donoughmore Committee Minutes of Evidence, paras. 1935-47.

⁴⁷ *Parliament* (1939), p. 491. The idea was, however, welcomed by Professor Robson in *Political Quarterly*, Vol. 3, No. 3, pp. 354-5 (1932).

⁴⁸ Cmd. 4060, pp. 62-4, 67-70.

⁴⁹ H.C. 189-1 of 1946, para. 4793 (8)-(20).

⁵⁰ In 1932 Sir Ivor Jennings suggested that the quality of the control exercised by the Committee would depend very largely on its clerk. It seems inevitable that the quality will depreciate when a successor has to be found to Sir Cecil Carr. (See *Public Administration*, Vol. 10, p. 336.)

⁵¹ See definition of 'statutory instrument' in s. 1 (1).

examined still derive from emergency legislation, though the proportion is decreasing. On the whole, it seems unlikely that the number of instruments will soon start appreciably to diminish. It remains to be seen whether the Select Committee as at present constituted can continue to carry what may be an ever-increasing burden.

2. *Consultation of Interests.*

Government by consent has always, no doubt, depended to some extent on direct consultation as well as on the more usual indirect consultation through Parliamentary representatives. Proposed Bills have long been discussed outside Parliament before introduction. But the importance of this practice when applied to delegated legislation is obviously much greater, as Parliamentary consideration will not automatically follow. When this practice works well and fully, it solves much of the constitutional problem involved in the delegation of legislative power. For to Parliament—a general body—are left those general matters for the examination of which it is both fit and has opportunity, while to the interests affected or their representatives is left the examination of particular, specialised and technical details. The Parliamentary function is therefore doubly important for it is not only to debate principle and policy but also to ensure that no sectional interest is able to exert a disproportionate influence in any particular sphere of legislation. Since, however, in this case the function is performed when the Bill containing the power to legislate is being considered and therefore precedes the exercise of the power, it becomes clear that the central and recurrent problem of delegated legislation is how to determine what is general and therefore should be in the Bill for Parliamentary consideration and what is particular and therefore should be left for governmental regulation. We cannot, however, attempt a solution to this problem in this article.

We are not concerned here with the departmental practice of consultation. It is no doubt true as Sir W. Graham Harrison has said that 'No Minister in his senses with the fear of Parliament before his eyes would ever think of making Regulations without (where practicable) giving the persons who will be affected thereby (or their representatives) an opportunity of saying what they think about the proposal'.⁵² The practice is common and of the utmost importance. But we limit ourselves here to statutory requirements.

It has been argued that the departmental practice should be made obligatory by statute in all cases. As is well known the Rules Publication Act, 1893,⁵³ required the publication of proposed rules at least forty days before they were made and required the rule-making authority to consider any representations made by any public body. As is also well known, certain departments were

⁵² Donoughmore Committee (Minutes of Evidence, pp. 35-6 (4)).

⁵³ S. 1.

excluded by the Act from its operation and a great number of subsequent statutes excluded their regulations. The Statutory Instruments Act, 1946, in repealing the Rules Publication Act, 1893, did not make any provision for this type of ante-natal publicity. This omission was defended by the Lord Chancellor on the ground that the development of the departmental practice made the provision both inadequate and superfluous. He said, 'We no longer promulgate the regulations or rules in the *Gazette* and wait for representations to be made. We go to the trade or interest concerned and deal with it by getting them round the table, hearing what they have to say, and then drafting the rules after obtaining their views'.⁵⁴ At the same time, the general requirement of the Rules Publication Act, 1893, has for a long time been paralleled by specific requirements in particular Acts. These requirements have reached their furthest development in the National Insurance Act, 1946, under which the Minister has to submit his regulations to a statutory advisory committee for their consideration, and in such Acts as the Dock Workers (Regulation of Employment) Act, 1946, where the legislation is proposed by those individuals whom it will affect. An account of the ordinary types of statutory requirement must, however, precede the extraordinary. The ordinary types are two. The first requires that individuals affected by the proposed instrument shall have an opportunity of stating their case to the rule-making authority. The second requires the Minister to consult specified interests, including statutory advisory bodies.

(a) *Individual objection.* This type of statutory requirement is well exemplified by the Factory Acts. Lord Shaftesbury's Act of 1833 to regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom, empowered inspectors to make 'all such Rules, Regulations and Orders as may be necessary for the due Execution of this Act . . . Provided, nevertheless, that any such Orders may be altered and disallowed by one of His Majesty's Principal Secretaries of State, on complaint made to him by memorial from any party interested.'⁵⁵ Again, under the Factory and Workshop Act, 1891, the chief inspector was authorised, after the Secretary of State had certified the necessity, to propose special rules in particular cases to the factory occupier, who could object within twenty-one days. If the occupier objected and the Secretary of State did not meet his objection, 'the matter in difference between the Secretary of State and the occupier' was referred to arbitration. The two arbitrators and the umpire were empowered to examine witnesses on oath and to consult counsel and any engineer or scientific person.⁵⁶ The Act of 1895 provided that in such cases the arbitrators or umpire could on the application of workmen employed in the factory,

⁵⁴ 139 H.L. Deb. 5 s., col. 330.

⁵⁵ 3 & 4 Will. 4, c. 103, ss. 18-19.

⁵⁶ Ss. 8-12, Sched. 1.

appoint a person to represent the workmen on the same footing as the other parties.⁵⁷ The constitutional interest of this procedure needs no stressing. Had it been developed, this idea of requiring a Minister, represented by an official, to submit to arbitration on equal footing with an individual having an interest might well have altered the whole aspect of delegated legislation. Whether it would have remained possible to conduct administration on these lines may be doubted. At all events, the procedure did not survive. The consolidating Act of 1901 empowered the Secretary of State to make regulations for dangerous trades. If objections were made to his proposals, a public inquiry was held.⁵⁸ The Factories Act, 1937 has similar provisions for the making of 'special regulations'.⁵⁹ A modern example of this type of statutory requirement can be found in the Radioactive Substances Act, 1948, which provides for publication of the proposal to make regulations, and opportunity for objections followed by either public inquiry or a personal hearing.⁶⁰ This type of procedure is of course common for provisional orders, special orders and special procedure orders.

(b) *Consultation with specified interests.* The Minister is here required to consult certain specified interests before he makes the instrument. These interests are normally either statutory advisory bodies or representatives of those likely to be affected or local authorities. The London and Home Counties Traffic Advisory Committee set up by the London Passenger Transport Act, 1933⁶¹ following an earlier model, and the Merchant Shipping Advisory Committee set up under the Act of 1906⁶² are well-known examples. Other Acts establishing similar bodies for this purpose include Importation of Plumage (Prohibition) Act, 1921,⁶³ Therapeutic Substances Act, 1925,⁶⁴ Fertilisers and Feeding Stuffs Act, 1926,⁶⁵ Agricultural Development Act, 1939,⁶⁶ Goods and Services (Price Control) Act, 1941,⁶⁷ Licensing Planning (Temporary Provisions) Act, 1945,⁶⁸ Coal Industry Nationalisation Act, 1946,⁶⁹ National Insurance (Industrial Injuries) Act, 1946,⁷⁰ Fire Services Act, 1947,⁷¹ Agriculture Act, 1947,⁷² and Radioactive Substances Act, 1948.⁷³

⁵⁷ 58 & 59 Vict. c. 37, s. 12.

⁵⁸ 64 Vict. & 1 Edw. 7, c. 22, ss. 80-86.

⁵⁹ S. 129, Sched. 2.

⁶⁰ S. 9.

⁶¹ Ss. 57-66, Sched. 12.

⁶² S. 79.

⁶³ S. 3.

⁶⁴ Ss. 4, 5.

⁶⁵ S. 23.

⁶⁶ S. 23.

⁶⁷ S. 17 (1).

⁶⁸ S. 3.

⁶⁹ S. 14 (2).

⁷⁰ S. 61.

⁷¹ Ss. 18, 21, 26 (6).

⁷² Ss. 25 (2), 77.

⁷³ Ss. 3 (11), 4 (6), 5 (5), 6.

Before making a development council order under the Industrial Organisation and Development Act, 1947, the department concerned is required to consult any organisation appearing to be representative of substantial numbers of employers and workers in the industry.⁷⁴ The Agriculture Act, 1947, requires the Minister to consult bodies representative of the interests of landlords and tenants before making certain regulations and orders.⁷⁵

Ministers are frequently required to consult local authorities before making statutory instruments. Under the Local Government Boundary Commission Act, 1945, the Minister is required to make regulations laying down general principles for the Commission after consultation with such associations of local authorities as appear to him to be concerned.⁷⁶ Similar modern requirements are to be found in the Town and Country Planning (Scotland) Act, 1945,⁷⁷ the Fire Services Act, 1947,⁷⁸ the Distribution of Industry Act, 1945,⁷⁹ the Housing (Financial and Miscellaneous Provisions) Act, 1946,⁸⁰ and the Probation Officers (Superannuation) Act, 1947.⁸¹

Where any of these statutory provisions operate, the effect is that the Minister must generally consult *some* body before he makes the instrument. Where that body is specified (for example, an Advisory Committee) failure to consult would invalidate the instrument.⁸² But where, as is often the case, the Act requires the Minister to consult 'such bodies as appear to him to be representative of the interests concerned', proof of failure to consult becomes difficult; when the requirement is to consult 'such bodies (if any)',⁸³ it becomes impossible. Section 1 (1) of the New Towns Act, 1946, provides: 'If the Minister is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town'. The Minister normally holds a conference with the local authorities who appear to him to be concerned. In *Rollo v. Minister of Town and Country Planning*,⁸⁴ the conference was held before the Act had been passed by the House of Lords. Up to the date when the Minister made his final order it was open to the local authorities to put before him any matter which they thought of importance. It was held by the

⁷⁴ S. 1.

⁷⁵ Ss. 22, 37.

⁷⁶ S. 1 (3).

⁷⁷ Ss. 5 (2), 8 (1).

⁷⁸ Sched. 5, para. 19 (1).

⁷⁹ S. 7 (4).

⁸⁰ S. 16 (6).

⁸¹ S. 3 (1).

⁸² *May v. Beattie* [1927] 2 K.B. 353, 363.

⁸³ *E.g.*, Sea Fish Industry Act, 1938, s. 2 (5), and Cinematograph Films Act, 1938, s. 41 (2).

⁸⁴ [1947] 2 All E.R. 488; [1948] 1 All E.R. 13.

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Court of Appeal that there had been consultation within the meaning of the Act⁸⁵ and that the Minister was not obliged to complete the consultation stage before he published the draft order. Bucknill, L.J., stated: 'In my view . . . [consultation] means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and on the other hand, a sufficient opportunity must be given to the local authority to tender advice'.⁸⁶ It is clear that Parliament intended the Minister to decide which local authorities were concerned.⁸⁷

In the majority of the cases where the Minister is required to consult local authorities or representatives of affected interests, no doubt the Act is merely formalising what was already departmental practice. The greater the information obtained, the more likely is it that the regulation will achieve its purpose; the more those affected are consulted, the smoother will run the administration, provided that those affected feel that their representations have been properly considered. From this point of view,⁸⁸ then, the reminder in the Act does no harm and may do good. Where the affected interests can be ascertained in advance, the mandatory 'shall consult' should replace the more usual permissive phrase; an additional general phrase would then be necessary formally to empower the Minister to consult any other interests as he thought fit.

We now pass from the ordinary to what we have called the extra-ordinary types of consultation.

(c) *Preparation by Affected Interests.* Here the power to draft the instrument is delegated to the individual or group and the Minister becomes a confirming or approving authority. Local authorities, of course, have long exercised this power, but in this case the relationship of the local to the central authority is special and not to be compared with that of the individual to the administration.

Certain Factory Acts delegated to the occupier of a factory the power of making rules to compel the observance of the requirements of the Acts regarding cleanliness, ventilation and general health matters.⁸⁹ Marketing schemes under the Agricultural Marketing Act, 1931,⁹⁰ and the Sea Fish Industry Act, 1938,⁹¹ are made by persons substantially representing the producers of a product in an area with elaborate procedures for public inquiries and polls. Redundancy and price schemes under the Cotton Industry

⁸⁵ See also *Fletcher v. Minister of Town and Country Planning* [1947] 2 All E.R. 496.

⁸⁶ [1948] 1 All E.R. 17.

⁸⁷ *Fletcher v. Minister of Town and Country Planning* [1947] 2 All E.R. 498.

⁸⁸ But see below, p. 316.

⁸⁹ See, e.g., 27 & 28 Vict. c. 48, s. 5; 46 & 47 Vict. c. 53, ss. 7-11.

⁹⁰ Ss. 1-8, 10.

⁹¹ Ss. 5-14.

(Reorganisation) Act, 1939,⁹² followed a similar procedure. In these two latter Acts an Advisory Committee examines the scheme and its report is laid before Parliament. Under the Hill Farming Act, 1946,⁹³ a land improvement scheme may be submitted to the Minister by any person having an interest in the land or desiring to acquire an interest or by two or more such persons, and the Ministers may approve the scheme and make grants. Perhaps, however, this is delegated administration, not legislation.

We are on different ground when we come to the Dock Workers (Regulation of Employment) Act, 1946,⁹⁴ which provides that schemes 'for ensuring greater regularity of employment for dockworkers and for securing that an adequate number of dockworkers is available for the efficient performance of their work' may be prepared jointly by bodies representative of dockworkers and employers. If the Minister is satisfied with the scheme, he prepares a draft order embodying the scheme and publishes it. Instead, he may remit the scheme for reconsideration with his comments. If no objections are made to the published draft, the Minister may approve the scheme with minor modifications. If objections are made, the Minister 'shall cause inquiries to be made' and may, after considering 'the result of the inquiries', make the order with modifications.⁹⁵

(d) *Approval by statutory body.* Under a few recent statutes, regulations have to be submitted to a statutory body by the Minister and the report of that body laid before Parliament. The effect is that the Minister must either accept the report with its proposed amendments or be prepared to defend his refusal to do so in Parliament. It is right that the last word should rest with the Minister; but he will be a very foolish Minister who repeatedly insists on having it by refusing to accept the advice of a statutory body specially charged with advising him. Three examples of this type of consultation are to be found in the Control of Employment Act, 1939,⁹⁶ the Requisitioned Land and War Works Act, 1945,⁹⁷ and the National Insurance Act, 1946.⁹⁸ We will deal with the last and most important.

The affected interest under the National Insurance Act is the whole nation. The number of categories is too large for representation on any committee. At random, we think of housewives, charwomen, students, orphans, lawyers, doctors, fishermen, airmen, public officers, schoolteachers, nurses, professional sportsmen, commercial travellers and so on, all of whom clearly present different

⁹² Ss. 6-19, 25.

⁹³ Ss. 1-7, Sched. 1.

⁹⁴ Ss. 1-2, Sched.

⁹⁵ *E.g.*, S.R. & O., 1947, No. 1189.

⁹⁶ Ss. 1 (1), 5 (1). For example of Report of Committee see H.C. 107 of 1939-40.

⁹⁷ Ss. 9 (6), 17.

⁹⁸ S. 77.

problems of administration. The Act compromises.⁹⁹ Apart from the chairman, the authorised number is not less than four nor more than eight, including at least one woman; one of the members is to be appointed after consultation with organisations representative of employers, another after consulting workers' organisations, a third after consulting friendly societies, and a fourth after consulting the appropriate Northern Irish authority. Four others have in fact been appointed: a former President of the Society of Medical Officers of Health in Scotland, a well-known administrative lawyer, an alderman, and the Warden of a College Hall of Residence for Women. The chairman is Sir Will Spens.¹ Members are appointed by the Minister, normally for five years. No member of the House of Commons may sit and the Minister has power to dismiss any member for unfitness or incapacity.

The functions of the Committee are to give advice and assistance to the Minister in connection with his duties under the Act, and in particular to consider and advise him on any special matters which he refers to them.² Also, before making any regulation under the Act, the Minister must submit a preliminary draft to the Committee, save in certain cases. The Committee must publish notice of the fact that a draft has been received, state where copies may be obtained and explain how and when objections may be made. The objections must be written and specify the particular alterations asked for. The Committee also hears oral evidence at its discretion. The Committee examines the draft and the objections and reports to the Minister who, having considered the report, makes the regulation or draft regulation; this is laid before Parliament together with the Committee's report and a statement by the Minister showing amendments made by him since the Committee's report, the effect of the Committee's recommendations and the reasons for not adopting any particular recommendation. In cases of urgency or for any other special reason, the Minister may make the regulations before receiving the Committee's report but such provisional regulations are only valid for three months after he has received the report.³

Between November 14, 1947, and June 18, 1948, the Committee examined seventeen sets of regulations and reported on two special questions submitted to them by the Minister. The first of these questions was whether shore fishermen should be treated as employed or self-employed persons for the purposes of the Act. The Committee received written representations and also heard oral evidence. The manner in which the Committee dealt with this matter indicates the thoroughness of their general approach. They

⁹⁹ Sched. 5.

¹ 443 H.C. Deb. 5 s, cols. 690-1.

² S. 41.

³ S. 77.

noted ⁴ first that the principle of the Act was that eligibility for unemployment benefit depended on the claimant being employed (those self-employed or not gainfully employed being excluded) and that although the Minister had power to vary classifications he presumably should not contravene this principle so as, for example, to include self-employed persons whose continued employment depends on circumstances beyond their control, such as the weather. The particular problem was complicated by the fact that certain members of the crew were also owners or part-owners of the boat, but it was decided that no useful criterion could be evolved based on the degree of ownership. The recommendation ⁵ was that such owners or part-owners should, with the other members of the crew, be treated as employed persons, subject to certain exceptions.⁶ The reason for this decision was based purely on the policy that, due to the presence in a very unusual degree of 'a sense of solidarity, of social equality, and of identity of interest between members of the crew concerned, irrespective of ownership of the boat in whole or part', it would be most unwise to drive a wedge between an owner or part-owner and the rest of the crew.⁷ That this method of approach is desirable can hardly be doubted, but it is worth noting that the Committee could easily have taken a much more restricted view of their functions or even have argued merely on the question whether shore fishermen who owned or partly owned a boat fell within the dictionary meaning of 'employed', or within that of 'self-employed'; the attitude of the Committee that they are, within the intention of the Act, a policy-recommending body makes their reports of the greatest interest and value.

The Committee recommended amendments of varying importance in all but one of the seventeen sets of regulations submitted to them. In every case, the Minister accepted all their recommendations which were unanimous, except in one instance.⁸ In addition, on several occasions, undertakings were obtained from the Ministry on the strength of which amendments were not recommended. The liaison between the Committee and the Ministry obviously has to be close if the system is to work satisfactorily; it certainly appears from the reports that this is so. On more than one occasion the Committee have asked the Ministry to redraft and resubmit parts of regulations which appeared to be unnecessarily obscure and this has been done ⁹; there seems every reason to expect that the intelligibility of National Insurance regulations will as a result become a model for other departments. The number of important recommendations made and accepted as amendments

⁴ H.C. 137 of 1947-8, paras. 16-17.

⁵ *Ibid.*, paras. 22, 24.

⁶ *Ibid.*, paras. 25-9.

⁷ *Ibid.*, paras. 23-4.

⁸ H.C. 172 of 1947-8.

⁹ H.C. 140 of 1947-8, para. 12; H.C. 156 of 1947-8, para. 16.

is very large. Only a few can be indicated here. A maternity benefit regulation was amended to ensure that officers of the Ministry could not make inquiries as to the advice given to a woman by her doctor or midwife.¹⁰ The question of supplementation by employers of unemployment benefit was considered.¹¹ It was recommended that doctors employed whole-time in all hospitals should be insured as employed persons; so also whole-time coroners employed under public or local authorities; so also registrars of births, deaths or marriages who are not salaried officers¹²; the cases of many other groups were considered and recommendations made or not made. A contributions regulation exempts from liability to pay all those who are receiving full-time education up to the age of eighteen, and those who are receiving full-time training at a course provided by or on behalf of a Government Department; representations were made to the Committee that this exemption should be extended to cover all students continuing whole-time education beyond the age of eighteen; certain amendments were recommended.¹³ This list could be continued—only a few examples have been chosen at random—but there is one set of regulations examined by the Committee which merits more detailed attention.

The National Insurance (Determination of Claims and Questions) Regulations, 1948,¹⁴ specify the manner in which questions shall be determined by the Minister and the statutory authorities. The Regulations, following the outline in the Act,¹⁵ require the Minister to determine certain questions, the remainder being left to insurance officers, with appeal to local tribunals, and with further appeal, under certain conditions, to the Commissioner. The Minister normally appoints a person to hold an inquiry and to report on those questions which he is required to determine; he may refer, and the claimant may appeal on, a question of law to the High Court. Insurance officers may refer cases direct to the local tribunals. One important question is the extent to which claimants should be entitled to representation at the different stages of the procedures. The Committee recommended that any person might represent a claimant at the Minister's inquiry¹⁶; they agreed that, for speed and informality, there should be no legal representation before the local tribunal but recommended that the same limitation should expressly bind the Ministry also¹⁷; but where the Commissioner holds a hearing, the Committee recommended that, in view of the matters which would be at issue, legal representation should be

¹⁰ H.C. 147 of 1947-8, paras. 14, 17.

¹¹ H.C. 161 of 1947-8, paras. 37-39.

¹² H.C. 172 of 1947-8, paras. 12, 14, 17.

¹³ H.C. 177 of 1947-8, paras. 27-39.

¹⁴ SI 1948, No. 1144.

¹⁵ S. 43.

¹⁶ H.C. 144 of 1947-8, para. 12.

¹⁷ *Ibid.*, para. 42.

permitted.¹⁸ Another amendment concerned the giving of reasons in decisions.

On this point, the Committee drew a distinction. While not interfering with the departmental regulation which required the insurance officer to give reasons for his decision,¹⁹ the Committee recommended that the Minister²⁰ and the local tribunals²¹ should be required to issue a statement giving the *grounds* of their decisions; for the Commissioner's decisions the Committee made no recommendation in the expressed expectation that he would, following the practice of umpire in unemployment insurance cases, give reasons and indicate what he regarded as leading decisions.²² Where appeals are possible from one body to another, it is clearly essential that the claimant be informed of the reasons for or grounds of the decisions. In this connection, the Committee further recommended that claimants on being informed of the decisions of insurance officers and local tribunals should also be notified of their rights of appeal.²³ The Ministry gave an undertaking that notes of guidance on procedure would be issued to persons holding Ministerial inquiries and that such persons if not legally qualified would be assisted at the inquiry by a person so qualified²⁴; the Committee therefore made no recommendation on this point; further, they agreed that it would be undesirable to lay down the precise procedure to be followed when appeals were made to local tribunals and the Commissioner.²⁵ The departmental draft permitted local tribunals to require the withdrawal of all persons, other than the clerk, from the sitting for the discussion preceding the decision; the Committee recommended that this requirement should be mandatory.²⁶ The question was considered whether the tribunals should permit the press and the public to attend their sittings; in view of the personal and domestic nature of the matters discussed, it was agreed not to recommend an amendment providing for this publicity.²⁷ One last recommendation—many others were made—is of particular interest. The departmental draft contained a regulation which permitted the Minister to dispense with any of the requirements in that part of the regulations which govern his decisions if he was satisfied that there was reasonable cause for so doing. In the view of the Committee this wide dispensing power was improper and they recommended that it should be omitted.²⁸

¹⁸ H.C. 144 of 1947–8, paras. 56, 60.

¹⁹ *Ibid.*, para. 36.

²⁰ *Ibid.*, para. 17.

²¹ *Ibid.*, para. 47.

²² *Ibid.*, para. 58.

²³ *Ibid.*, paras. 35–6, 48.

²⁴ *Ibid.*, paras. 9–10.

²⁵ *Ibid.*, para. 61.

²⁶ *Ibid.*, paras. 43–4.

²⁷ *Ibid.*, para. 45.

²⁸ *Ibid.*, paras. 22–3.

We are not concerned in this paper with the many questions of administrative justice raised by these regulations and the recommendations of the Committee. We are concerned with its value as consultative machinery for the consideration of the proposed exercise of the delegated power to legislate. Clearly the department itself could have conducted a similar inquiry and no doubt would have done so. Had it done so, the inquiry could either have been carried out by departmental officials or by the use of a departmental committee. If the former method had been adopted, it seems unlikely that the inquiry could have been so thorough—if only due to the pressure of other work—or so expert and impartial. It is easy and not particularly profitable to criticise the ‘official mind’ or the ‘departmental approach’; but when the proposed regulations are to affect so closely the whole population of the country, it seems reasonable to assume that a carefully picked lay committee—‘lay’ in the sense of not being composed of departmental officials—will be able more accurately to discover weaknesses in the regulations and more able to assess the value of objections. It is most important to remember that the Committee is far more than a hearing body which merely weighs evidence and evaluates objections; it frequently makes recommendations based simply on its own knowledge and all its recommendations are finally its own, however impressed it may in fact have been by a particular representation. It is, as already noted, a policy-recommending body. If, on the other hand, this Committee had been a departmental committee, much would have been lost. Its statutory origin gives it an independence and an authority of the greatest importance; so also does the provision that its report is to be laid before Parliament. That its influence is thereby greater is probably not so important—for, as we have said, the method works well because it is based on co-operation with the Ministry and would work ill or not at all if based on conflict. But the psychological value, both to the members of the Committee and to the Committee in its relations with the public, of institutionalism is considerable. A consultative public body with a degree of formal independence performs its functions better than a departmental body, however great its actual independence and authority, on a subject affecting every citizen. This is not to deny the value of the whole host of advisory and consultative committees and councils working under departments; the government of a modern State could not be carried on without them and in many cases to grant them formal independence would result in a loss of efficiency. But generally it is submitted that committees to examine proposed regulations gain from having an independent status, and that this is particularly true where the subject-matter of the regulations is of widespread effect. It is not always possible to rely on objections being made to a proposed regulation either by individuals or bodies. As already indicated, some groups affected are too large or too scattered for

organisation to be possible; individuals come together into an organisation for a large number of reasons, but generally in addition to common interest there must be a special reason. Before considering the regulations relating to married women and those relating to widows and guardians the Committee gave special notice, as is their custom, to organisations which they considered might be specially interested. In the former case, three representations only were made²⁹; in the latter, none at all.³⁰ No doubt the reason why so few representations were made in these two cases is the absence of any bodies specifically concerned with the welfare of married women, widows or guardians; on the other hand, one would have thought that there were many organisations (no doubt those to whom the Committee gave notice) sufficiently connected with these groups to be interested. From the point of view of the student and the interested public, it is disappointing that the Committee does not append to its reports a list of the organisations to whom special notice of the preliminary draft was sent or, at least, of those organisations who made representations whether or not they received special notice. The omission is clearly deliberate and no doubt a number of frivolous representations would be made if the list were published. Nevertheless, there do not seem to be reasons of sufficient weight to justify the policy of the Committee. Where a body is required to act as judge between two parties, it must both in fact and in appearance give a fair hearing to both. Where a body has to make administrative decisions, procedures are often directed to ensure that it is properly informed³¹; and here, too, it is desirable not only that the body shall, in fact, be properly informed but also that it shall *appear* to be. One other small related criticism may be made; the reports of the Committee are sometimes difficult to follow but the Select Committee on Statutory Instruments has suggested that the department might set out a brief tabular summary of the recommendations of the Committee and indicate, categorically, item by item, how and where the department has met them or why it has not met them.³²

The essential differences between this Advisory Committee and those others we have noted which by statute must be consulted by a Minister before regulations are made, are first, that the detailed procedure of the Committee for its purpose of eliciting objections and representations from those affected is laid down in the Act, and second, that its report must be laid before Parliament with the Minister's explanations.

The statutory obligation imposed on a Minister to consult such bodies as appear to him likely to be affected or to consult a specific

²⁹ H.C. 150 of 1947-8, para. 3.

³⁰ H.C. 156 of 1947-8, para. 3.

³¹ Cp. attitude of House of Lords to requirement of local inquiry under New Towns Act, 1946, in *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87.

³² H.C. 201 of 1947-8, para. 6.

advisory committee may mean much or little in practice. The requirement to consult, moreover, may be regarded on the one hand as a safeguard to ensure that the Minister has all the relevant information on which to base his decision; this is the normal purpose where committees are appointed to advise the Minister generally on a special subject, often of technical difficulty. On the other hand, where the committee is specifically appointed for the purpose of examining subordinate legislation, a different consideration is relevant. For here the committee, although it will give the Minister much valuable information, is in fact examining a legislative proposal the substance of which Parliament has not examined and probably will not examine. This type of committee represents a constitutional development which has become necessary and desirable because of the inevitable growth of delegated legislation. Its purpose is not therefore primarily to provide further information for the Minister but to act as a body (appointed by the Minister who rightly retains the ultimate control) in a more or less representative capacity. It is not representative as the House of Commons is representative, but it should be, and normally is, composed of members who can put the point of view of the persons affected by the proposal. Where the subject-matter of the proposal is special and the number of persons affected therefore comparatively small, these points of view will be accurately presented. But even where the subject-matter is general and the number of persons affected very large, the example of the National Insurance Advisory Committee shows how valuable can be examination by a small, well-chosen body. We have already given our reasons for thinking that great advantages follow where the body has a statutory origin and where its reports are required to be laid before Parliament. When to the deliberations of such a committee are added those of the Select Committee on Statutory Instruments, working within its terms of reference, the usual constitutional objections can hardly be sustained and the development of these two types of procedure seems likely also to solve the practical difficulties and dangers which attach to the delegation of legislative power.

J. A. G. GRIFFITH.

PLEADING: A SUBJECT FOR SCIENTIFIC STUDY ?

I HAVE recently had the pleasure of reading a leading American textbook on the Law of Code Pleading¹ and this has led me to some rather dismal reflections on the lack of interest in the vital subject of pleading which has been displayed in this country almost since the time of the Judicature Act, 1873. Under the old strict system of pleading at common law the slightest mistake might prove fatal to the pleader's case, and the art of pleading was developed to a very high standard. It produced a race of lawyers like Parke B. who even if they could on occasion properly be described as 'pedants' by their more liberal brethren did much to develop the common law on sound lines. The art was of course learned in chambers and while it did not stimulate any great theoretical textbook it did bring forth that masterpiece of practical wisdom and profound legal scholarship *Bullen & Leake*, the third and best edition of which is still highly prized. The special pleader was for long an esteemed member of an important sub-branch of the legal profession, and even after the first world war the names of several special pleaders still appeared in the *Law List*.

The price paid by litigants for the maintenance of this system could not, however, be justified, and after some unsuccessful experimentation² the Judicature Act, 1873, introduced an entirely new system, called in America 'code pleading' from the fact that the requirements are laid down in detail in a practice code. Under this the courts are given complete discretion to cure mistakes in pleading by allowing amendments. This has been very liberally exercised, and has undoubtedly resulted in a pronounced lowering of standards. In my day at the Bar the number of junior barristers in the Temple who were spoken of as really eminent pleaders could have been counted on the fingers of one hand, and I have reason to suppose the figure has not swollen. The result of this liberal allowance of amendments is an occasional adjournment with consequent expense, but more often it leads only to some embarrassment of counsel, and the case proceeds without too much extra difficulty. It might, therefore, be said with some show of justice that apart from a certain loss of artistry in pleading the present system works adequately, that there is no need for concern about the underlying principles, if any, and that the absence of discussion need not call for comment.

¹ *Code Pleading*, by Charles E. Clark, U.S. Circuit Judge: 2nd ed., West Publishing Co., St. Paul, Minn., 1947.

² See Holdsworth: 1 Camb.L.J. (1923) 261.

I do not myself think that this is a healthy reaction. It is only within the last few years that we have passed entirely out of the personal influence of those trained under the old system, and with a few outstanding exceptions the present generation of judges do not seem to me to compare for either accuracy of expression or broad grasp of principle with their predecessors of Victorian times or of the earlier years of the present century. Certainly many of the outstanding names in the common law have over the last generation been found in America, and it is perhaps, not without significance that in that country there is a vivid and enthusiastic interest in all matters of evidence and practice, and perhaps particularly in pleading.

In no English university is there a chair in either Evidence or Procedure; none of our academic lawyers appear to take more than a tepid interest in the subject; and the literature is almost non-existent. Apart from one good students' textbook³ there is really nothing to which one dare call attention, and the periodical literature is only noteworthy by its absence. In America all the leading university law schools have their chairs, and such men as Professors Clark (when dean of the Yale Law School), Edson Sunderland, and Eddie Morgan, are well known as specialists in this field, while in the narrower arena of pleading proper, Williston, Clark, Pomeroy, McCaskill, are among the names that immediately leap to the mind for contributions of outstanding importance. A number of textbooks have a recognised place in the legal library and the columns of the reviews and journals continually bear witness to the close interest which the profession takes in the subject.

It seems to be high time that this unfortunate situation was rectified. It is not right that the country of Bentham, whose work undoubtedly stimulated the reforms which in America are particularly associated with the name of David Dudley Field and which led in 1848 to the passing by the New York State Legislature of the first code of civil procedure to receive enactment in any common law country, should be without a chair in this important branch of law. Field's work, which was celebrated last year in a centenary celebration held by the enterprising New York University Law School, led to the establishment of code pleading in a number of the other States in the U.S.A. and was undoubtedly a factor in the movement which culminated in our own modern system of pleading, which again reacted upon American opinion and helped to produce the new American Federal Code which has admittedly been much influenced by the Rules of the Supreme Court and which on a comparatively short experience of its working is generally regarded by American lawyers as a real success.

³ *Pleading and Practice*, by the late W. Blake Odgers K.C.

A consideration of the history and purpose of the methods of pleading adopted in common law countries opens up some fundamental problems of jurisprudence with which it is not within my competence to deal. Judge Clark's book does, however, bring out some points which should be of interest to those English lawyers whose education and practice has not taken them into this field. I propose here to touch upon only a very few of them.

In the first place, the valuable historical and comparative survey with which the book opens brings out quite clearly that the elaborate system of formal pleading which was developed at common law is characteristic of a middle stage in the development of a procedural system. Roman law went through a similar development, gradually tending to dispense with written pleadings and to rely upon oral statements made at the time. Most, if not all, Continental countries have reached the same stage, documentary statements being kept to a minimum. The tendency in both England and America over the last century has clearly been to attach less importance to the pleadings, and it is an interesting speculation whether we are moving on the same line of development as the civil law countries.

The present Anglo-American system of pleading has a number of obvious advantages which were well brought out in a report by a committee of the American Bar Association, which Judge Clark summarises as follows :—‘ (1) to serve as a formal basis for the judgment to be entered ; (2) to separate issues of fact from questions of law ; (3) to give the litigants the advantage of the plea of *res adjudicata* if again molested ; (4) to notify the parties of the claims, defences and cross demands of their adversaries ’. It is difficult for a lawyer brought up entirely in the common law procedure to see how justice can effectively be administered without a fairly detailed insistence on point (4) above, at any rate in the complicated litigation arising from modern commercial and industrial transactions. It may be that the rather simpler nature of the transactions entered into in Roman times combined with the high expertise acquired by Roman magistrates made formal pleadings less needful than they are in modern England. The tendency in civil law countries is always to follow the Roman exemplar, but it is significant that in Germany in particular the litigants are required not only to state the nature of and the grounds on which their case is based, but to set forth the names of their witnesses and the evidence which they will give. It would be interesting to know whether these requirements, which in some respects go so much further than our own, mark a development arising from ‘ the felt needs of the times ’.

The German rule about witnesses and evidence is not, of course, compatible with the strict ‘ adversary ’ principle of litigation which has been so basic to the conception of judicial procedure in common law countries. This is not the place to develop a discussion

on that important topic, which requires instant and careful attention in this country now that the State is prepared to foot a heavy bill for the assistance of poor litigants, for if the taxpayers' money is to be used it must clearly be used to secure that justice is done, and not merely to ensure that the arena is cleared and each party to the dispute is given a fair fight and no favour. The whole system of common law pleading developed in relation to an 'adversary' conception of litigation, and while the reforms of 1873 went some distance towards giving the judge effective control over the litigation he is still handicapped in many ways, the most spectacular of which is his inability to insist that a particular witness should be called to give evidence when neither of the parties to the litigation is prepared to put him in the box because it is not sure whether his testimony will turn out to be damaging. Even if the adversary principle be retained, and there is much to be said in its favour in that its essentially dialectical approach to the problem of ascertaining the truth is in harmony with important currents of modern thought, it should be clear that much can be done to improve its working, and discussions about these ought to be more intense and more continuous than they have been in the past.

Judge Clark thinks that the most 'fundamental reform of code pleading was the substitution of the form of action for the various forms of action at law and for the suit in equity'. He goes on to observe how practitioners steeped in their own particular expertise have done much to stultify this reform in the belief that 'the ancient forms rested on distinctions inherent in the law'. A similar phenomenon is observable in England where Chancery pleadings remain very different from those found in the King's Bench Division, though the differences are rather of style and method than of substance. In divorce cases, however, the procedure has never been brought into line with that initiated by the Judicature Act, 1873, and despite the numerous reforms suggested recently by the Denning Committee, few of which incidentally seem to have been put into operation, the practice of the Divorce Court still smacks all too obviously of the ecclesiastical courts in which it had its origin.

One of the most interesting chapters in Judge Clark's book is that dealing with the cause of action. It is obviously a matter of great practical importance to be able to say exactly how much of the existing differences between two people can or should be brought before a court for adjudication in the same proceedings. The precise method of reaching this decision is open to much argument, and depends up to a point on considerations of a theoretical juristic character. In this country the problem has not given rise to anything like the same difference of opinion and controversy which it has occasioned in the United States, both in the courts and among the professors in the law schools. Judge Clark's own solution, which has been much discussed, both in court and class room, is essentially empirical and practical, looking rather to what can be

conveniently handled at the trial than to hard and fast rules of practice based on so called logical distinctions: in other words, he adopts the equity as opposed to the common law approach. This, though strongly criticised by such eminent scholars as Pomeroy and McCaskill, has met with much support and seems to me to be in accord with the best lines of Anglo-American legal development.

Since so much of the development of American code pleading has been influenced by or run parallel with the growth of our own modern system of pleading what Judge Clark has to say on, for example, such intractable problems as joinder of parties and joinder of causes of action cannot fail to be of interest, and indeed, of profit to English lawyers.

I am tempted to close this brief article, in which I have not attempted to do more than open up the subject, by entering a plea for the establishment of at least one chair in Procedure or in Evidence and Procedure in this country. The extensive and interesting case law which Judge Clark's work shows to exist in America is certainly paralleled in England, and would certainly provide a field of study, not only interesting in itself, but from which fruits would certainly be obtained of high value to the administration of our justice.

CHORLEY.

CRUELTY IN MATRIMONIAL CAUSES

THE Court of Appeal has recently given a number of important decisions on cruelty, and the time is perhaps, therefore, appropriate to review the law on the subject as it stands today.

Cruelty and Legal Cruelty.

The popular idea as to what is cruelty¹ does not necessarily coincide with such cruelty as will entitle a spouse to a remedy in law. The latter is sometimes called 'Legal Cruelty'.

It is true that Shearman J. in *Hadden v. Hadden*² said :—

'I do not think there is such a thing as "Legal Cruelty" as distinct from actual cruelty; cruelty means "cruel conduct", whether in legal language or the vernacular.'

But this expression, however, is exceptional and in general the courts do make a distinction between the two. For example Sir C. Cresswell in *Suggate v. Suggate*³ said :—

'Cruelty in ordinary language is an ambiguous term', and Lord Herschell in *Russell v. Russell*⁴ said :—

'It was conceded by the learned counsel for the appellant and is indeed, beyond controversy that it is not every act of cruelty in the ordinary and popular sense of the word which amounted to saevitia, entitling the party aggrieved to a Divorce; that there may be many wilful and unjustifiable acts inflicting pain and misery in respect of which that relief could not be obtained.'

Then there is the rather extraordinary statement of Sir F. Jeune P. in *Jeapes v. Jeapes*⁵ :—

'To leave a wife to starve is undoubtedly cruelty, but I was not certain it could be construed into legal cruelty.'

The courts have never fixed the line which divides those acts which they consider 'Legal Cruelty' from those which they think do not, for that line must necessarily be a fluctuating one depending on the ideas prevalent in each generation. In this sense, what is 'Legal Cruelty' is in some measure a test of our civilisation.

There is a tendency, albeit a gradual one, to relax the requirements of what is necessary to prove 'Legal Cruelty', and our

¹ The *Shorter Oxford Dictionary* defines cruelty as 'The quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness, hard-heartedness'.

² *Times*, December 5, 1919.

³ (1859) 1 Sw. & Tr. 489.

⁴ [1897] A.C. at p. 445.

⁵ (1903) 23 L.T. 74.

ideas are less rigid or hard boiled than those of our fathers or forefathers. Lord Stowell said in *Evans v. Evans*⁶ :—

‘ . . . it is the duty of the courts to keep the rule extremely strict. The cause must be grave and weighty and such as to show an absolute impossibility that the duties of married life can be discharged.’

Then as late as 1919 Scrutton L.J.⁷ said that the law of cruelty in divorce, must be closely watched against a tendency to take a too lenient view of what constituted ‘Legal Cruelty’, and after agreeing with Lord Stowell’s words about ‘grave and weighty’ added,

‘ It is not every conduct that causes injury to health which could be considered cruelty.’

An examination of modern cases, shows that the courts will find conduct as legal cruelty which would hardly have been held to be such in former times.⁸

Female Equality.

There is no doubt that ideas have changed as to the manner in which women should be treated; and the legislature has endeavoured as far as possible to put men and women on an equality, so far as the law is concerned.⁹

The development of ideas as to the correct treatment of a wife was discussed by Blackstone¹⁰ who wrote :—

‘ The husband also (by the old law) might give his wife moderate correction. . . . But, with us, in the politer reign of Charles the Second, this power of correction began to be doubted; and the wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege; and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.’

In Victorian times women were subject to many disabilities; and it was widely believed that a married woman was under a legal duty implicitly to obey her husband, and if she were recalcitrant, that he was permitted to use force to bring her to reason.

Readers of Trollope’s novels will remember that the basis of a number of his plots, is the conflict between a wife’s legal duty to obey her husband and the instinct of a spirited woman to assert her independence (see for example, *Phineas Finn*, *The Prime Minister* and *Is he Popinjoy?*).

⁶ 1 Hagg.Con. 35 at p. 37.

⁷ *Times*, December 11, 1919.

⁸ See, e.g., *Lauder v. Lauder* [1949] 1 All E.R. 76, where a husband sulked and ignored his wife, seriously affecting her nervous stability, which was held by the C.A. to be cruelty.

⁹ See, e.g., the Sex Disqualification Removal Act, 1919, and the preamble to the Guardianship of Infants Act, 1925.

¹⁰ Blackstone’s *Commentaries*, 12th ed., Vol. 444.

An expression of this view is found in Dr. Lushington's judgment in *Dysart v. Dysart*¹¹ :—

'I must be satisfied that the danger had arisen without provocation on her part and notwithstanding her correctly performing the duties of a wife amongst which is obedience in all things not sinful, if a wife can insure her own safety by lawful obedience and proper self command she has no right to come here, for this court affords its aid only where the necessity for its interference is absolutely proved.'

As late as 1891 Henn Collins Q.C. could argue in the celebrated case of *R. v. Jackson*¹² where the husband forcibly kidnapped his wife :—

'It is contended that, if a wife refuses to live with her husband he has a right by law to take possession of her person by force, and keep her not imprisoned but confined, till she consents to do so in order to prevent her from permanently withdrawing her society from him. . . . In Bac. Abr. (Tit. Baron and Femme, B.) it is stated thus "the husband hath by law power and dominion over his wife and may keep her by force within the bounds of duty and may beat her but not in a violent or cruel manner".'

The Court of Appeal decisively rejected this contention. Henn Collins J. has shown how the law has ameliorated in modern times and said in *Atkins v. Atkins*¹³ :—

'Formerly public opinion permitted the use of the ducking stool; and long after that ceased to be in use the husband could without censure by his neighbours, exercise a far stricter discipline than would be tolerated today and that even of a physical nature.'

This case, was the famous 'Nagging Case', where the learned judge held that constant nagging when affecting the health of the husband was sufficient cruelty in law and added, in effect, that Mr. Atkins being deprived of the right to beat his wife, was all the more entitled to relief from the court.

It is strange that this same judge reverted to the medieval view in *Meacher v. Meacher*¹⁴ where the wife wished to visit her sister, her only near relative, and her husband forbade her to do so, and on each occasion when she disobeyed him, he assaulted her.

Henn Collins J. held that as she had the power to stop the beatings at any time by refraining from seeing her sister, she was not the victim of cruelty. This decision, however, was reversed by the Court of Appeal.¹⁴

It is frequently said, that the spouses must take one another

¹¹ (1844) 1 Rob.Eccl. 106. And see *Oliver v. Oliver* (1801) 1 Hagg.Con. 359 at p. 363. 'It is the law of religion and the law of this country that the husband is entrusted with authority over his wife. He is to practice tenderness and affection and obedience is her duty'.

¹² [1891] 1 Q.B. 671 at p. 674.

¹³ [1942] 2 All E.R. 637 at p. 638.

¹⁴ [1946] P. 216.

for 'better or for worse', and much must be allowed for the 'wear and tear'¹⁵ of married life, but where 'wear and tear' ends and cruelty begins is uncertain, so there is an element of speculation whether a suit based on cruelty will succeed.¹⁶

Remedies for Cruelty.

In the years before 1937¹⁷ (at any rate after 1923)¹⁸ the courts were not frequently troubled with cruelty cases (except perhaps with persistent cruelty in the courts of summary jurisdiction) but since 1937 when cruelty was made a ground for divorce many cases have been dealt with in the High Court. Formerly cruelty was a ground only for a judicial separation though between 1857 and 1923 cruelty, in addition to adultery, was from time to time relied upon by a wife in order to secure a divorce.¹⁹

The Summary Jurisdiction (Married Women) Act, 1895, gave power to courts of summary jurisdiction to grant a maintenance order on the ground of persistent cruelty.²⁰ This Act is still in operation, and we have the anomaly that a higher degree of cruelty is required to be proved to get a mere separation than completely to dissolve the marriage tie.²¹

For the latter, cruelty simpliciter, is enough, for the former, it must be persistent as well.

Definition of Cruelty.

In *Russell v. Russell*²² the court adopted the definition of cruelty laid down by Lopes and Lindley L.JJ. in the Court of Appeal, in the same case, namely :—

'That it must be conduct of such a character, as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger.'

In this case, the wife had circulated false charges of an unnatural offence against her husband, and had persisted in them when she knew them to be false, but there was no evidence that his health had been thereby affected. The argument for the husband by Sir Robert Reid Q.C. was briefly this (at p. 408) :—

'These are the elements you have to consider—danger to health, physical injury, and so forth. But there are exceptional cases. The question is, do cases like the present come

¹⁵ *Buchler v. Buchler* [1947] 1 All E. R. at p. 326, and *Squire v. Squire* [1948] 2 All E.R., per Evershed L.J., at p. 56.

¹⁶ A good example of how judges can differ on this question is *Lauder v. Lauder* [1949] 1 All E.R. 76, where Singleton L.J. adopted the 'wear and tear' principle while Merriman P. and Pearce J. held the same facts to be cruelty.

¹⁷ When the Matrimonial Causes Act, 1937, came into force.

¹⁸ Matrimonial Causes Act, 1923.

¹⁹ Matrimonial Causes Act, 1857, s. 27.

²⁰ As amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925.

²¹ *Barker v. Barker* [1949] 1 All E.R. 247, disapproving of a contrary view by Denning J. in *Perks v. Perks* [1945] 2 All E.R. 494.

²² [1897] A.C. 395 at p. 399.

within the category of minor cases of annoyance, or do they rather come within the class of case Lord Stowell described as making the consortium absolutely impossible.'

By the narrow majority of five to four the House of Lords rejected this argument and in the words of Lord Davey at p. 467 :—

'The general idea, which, I think underlies all those decisions is that, while declining to lay down any hard and fast definition of legal cruelty, the courts acted on the principle of giving protection to the complaining spouse against the actual or apprehended violence, physical ill-treatment, or injury to health.'

Cruelty which does not cause injury to health, or apprehension of it must be rare, and in practice it is not difficult to produce medical evidence that the complaining spouse has in fact suffered physical injury, or that there is a danger of it, or that he or she is suffering from a nervous disorder, on account of the other spouse's conduct varying from nervous debility to neurasthenia.

The definition of Lopes and Lindley L.JJ. is, of course, not really a definition at all. It prescribes a necessary ingredient, without which conduct is not cruelty, but it does not go on to say that conduct which causes injury to health, or a reasonable apprehension of it, is necessarily cruelty; and since *Russell v. Russell* more than one judge has emphasised that to prove legal cruelty, mere proof of injury to health is not sufficient.²³

No judge has formulated a comprehensive definition of cruelty.²⁴ Lord Simon's²⁵ observations are typical of many judges in their cautious approach to this subject :—

'... the leading judicial authorities in both countries who have dealt with this subject are careful not to speak in too precise and absolute terms, for the circumstances which might conceivably arise in an unhappy married life are infinitely various. Lord Stowell, for example, in *Evans v. Evans* avoids giving a "direct definition". While insisting that "mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty".'

The Judge Ordinary in *Hudson v. Hudson*²⁶ said :—

'Perhaps exact definition is to be distrusted where all is degree and circumstance. Certainly great precision in the rule serves only to beget laxity in its application'.

²³ *Baker v. Baker* (1919) *Times*, Dec. 11 (C.A.); *Horton v. Horton* [1940] P. 187; *Bursell v. Bursell* (unreported C.A., April 26 and 27, 1948).

²⁴ Lord Halsbury Q.C. in *Russell v. Russell* [1897] A.C. 395 at p. 424: 'As no judge has ever affected to define what cruelty is exhaustively, so no judge has in my view ever affected to prescribe what individual elements would go to make up cruelty'.

²⁵ *Watt v. Thomas* [1947] 1 All E.R. 582 at p. 585.

²⁶ 33 L.J. (P.M. & A.) 5 at p. 6.

An objective test, which would have been very useful in practice was suggested by Sir John Nicholl in *Westmeath v. Westmeath* ²⁷ when he said that while cruelty was impossible to define with precision, the test should be rather the effects produced than the acts done.

As the law has developed, the courts look not only to the effects, but also to the quality and the quantity of the acts causing the injury or apprehension of it.

Two Kinds of Cruelty.

Cruelty cases divide themselves readily into two kinds ²⁸ :—

(a) the crude brutal kind and

(b) cases where there is no physical violence or hardly any, but the conduct of the respondent is such as to affect the petitioner's health.

(a) *Physical Violence.* These are cases of direct physical violence. The question here is one of quantum, that is to say, has the physical injury inflicted by the respondent been sufficient to amount to cruelty in law?

As a rule these cases cause little difficulty. The respondent, usually the husband, behaves like a brute and assaults his wife violently from time to time.

What then is the minimum which will establish 'Legal Cruelty'? It is established that one isolated act will be sufficient but this is most unusual.

It was said in *Westmeath v. Westmeath* ²⁹ 'The law does not require that there should be many acts and if one act should be of that description which should induce the court to think that it is likely to occur again and to occur with real suffering there is no rule that should restrain it from granting a decree'.

In *Grossi v. Grossi* ³⁰ Hannen J.O. held cruelty was established when there was one act of violence by the husband who had been bound over by the magistrates to keep the peace for twelve months.

In *Reeves v. Reeves* ³¹ the husband demanded money from his wife, swore at her, said he did not want her, attempted to strike her and kicked her on the leg. Sir Cresswell held that this was sufficient to justify a decree.

The same judge, however, in *Smallwood v. Smallwood* ³² refused to grant a decree where the husband sprang on his wife, threw her

²⁷ (1827) 2 Hagg.Eccl.Supp. 1 at p. 71.

²⁸ *Barrett v. Barrett*, 20 T.L.R. 73. Bucknill J.: 'Cruelty might be divided into two classes—acts of physical violence and acts such as spitting in a wife's face or using bad language towards her which went to make up legal cruelty'.

²⁹ (1827) 2 Hagg.Ecc.Supp. 59.

³⁰ L.R. 3 P. & D. 118.

³¹ See also *Saunders v. Saunders* (1847) 1 Rob.Ecc. 508. Spitting in a wife's face, accompanied by pushing and dragging her about a room and the admission by the husband that he had once slapped her face.

³² (1861) 5 L.T. 324.

down and nearly strangled her. The wife withdrew from cohabitation but continued to live under the same roof until the husband left some time later.

The distinction the courts seem to make is that regard must be had to the circumstances under which the isolated blow is given, and also to the character of the person giving it. If the violent act was committed during unusual excitement and without producing any considerable injury to the person it is not cruelty, but if the blow is a serious one and the court is of opinion that the injured spouse would be in danger of further ill-usage, then it will be sufficient.

By section 4 of the Act of 1895 if the husband is convicted summarily of an aggravated assault the wife can obtain summarily a separation order, and also where the husband is convicted on indictment of an assault upon his wife and fined five pounds or sentenced to two months' imprisonment, then the wife can apply to that court for a separation order.

Apart from these provisions the wife cannot obtain an order on the ground of persistent cruelty in the Domestic Court for one isolated act, however violent or disgusting, or whatever the effect on her health,³³ but two acts of violence have been held to be sufficient to establish persistence.³⁴

Threats.

'If a man keeps his wife in fear and subjection by threats he is guilty of cruelty'.³⁵

The court has always acted on the principle that it is not necessary to wait until the blow falls before it will afford protection. After all, the mere offer of a blow is a crime; and when a person is in bodily fear of a named person, and the court finds that there is reasonable ground for such fear, the defendant can be made to enter into a bond and even find sureties for his good behaviour.³⁶ The Divorce Court and the Domestic Court similarly protects a spouse, usually the wife.

The words of Lord Stowell are often quoted :—

'Proof must be given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait until the hurt is actually done; but the apprehension must be reasonable, not arising merely from diseased sensibility of mind'.³⁷

³³ *Rigby v. Rigby* [1944] P. 33.

³⁴ *Broad v. Broad*, 78 L.T. 687.

³⁵ Lord Merrivale in *Donkin v. Donkin* [1933] P. 17.

³⁶ See Stone, 80th ed. (1948), at p. 260.

³⁷ *Evans v. Evans*, 1 Hagg.Con. 35. Approved in *Curtis v. Curtis*, 1 Sw. & Tr. 192. *Kelly v. Kelly*, L.R. 2 P. & D. 59. *Russell v. Russell* [1897] A.C. 395. For other cases of threats, see *Bostock v. Bostock* (1858) 1 Sw. & Tr. 221; *Kirkman v. Kirkman* (1807) 1 Hagg.Con. 409; *Knight v. Knight* (1865) 4 Sw. & Tr. 103; *D'Aguilar v. D'Aguilar* (1794) 1 Hagg.Ecc. 773.

Venereal Diseases.

A particular example of the isolated act is where one spouse wilfully and recklessly communicates a venereal disease to the other spouse³⁸

Here four things have to be proved :—

- (a) That the respondent had a venereal disease to his knowledge.
- (b) That he or she communicated it to the other spouse.
- (c) Against the latter's will, and
- (d) That it was done wilfully or recklessly.

As to proof, in *Browning v. Browning*³⁹ Sir S. Evans, after an exhaustive and interesting review of the cases and the statute law relating to the competency of the husband and wife to give evidence (they only became fully competent in all cases in 1869), said :—

‘ What I decide today is that a wife establishes proof of a charge of legal cruelty against her husband when she proves she is a guiltless woman and that a venereal disease had in fact been communicated to her by him. When that has been done it is for the husband if he can to prove that he was ignorant or innocent or otherwise not guilty of the legal cruelty charged against him ’.

A further step was taken in *Foster v. Foster*⁴⁰ where it was held (overruling *Ciocci v. Ciocci*⁴¹) that it did not matter if the disease was not inflicted, if the husband knowing that he was afflicted, succeeded against the will of the petitioner, who knew he was so afflicted, in having sexual intercourse with her; and Atkin L.J. made the following useful observation :—

‘ If he so insists (on having sexual intercourse against her will) it appears to me that it is unnecessary to prove actual violence such as without considering the right to marital intercourse would amount to an assault. I think it would be sufficient if the husband who has a right to intercourse, does in fact insist upon it and makes his wife know that he intends to insist upon it against her will ’.

The mere innocent communication of the venereal disease does not amount to cruelty.⁴²

The position then, is that the petitioner states in evidence he or she has not had relations with any other man (or woman) except his or her spouse, and this is sufficient *prima facie* evidence of his or her innocence; and if it be then established that since the marriage he or she has contracted a venereal disease the court will draw the inference that he or she has contracted it from the other spouse. It is then for that spouse to establish his or her innocence or ignorance.

A medical practitioner is bound to give evidence about his

³⁸ *Browning v. Browning* [1911] P. 161.

³⁹ [1911] P. 161.

⁴⁰ [1921] P. 438.

⁴¹ (1854) 1 Ecc. & Fd. 121.

⁴² *Butler v. Butler* [1917] P. 244.

treatment of the patient if required to do so,⁴³ and it is also his duty if called upon by the party suffering from the disease, to give information to this party or to anyone, if the patient authorises him to do so, at any rate when this information is required for use in court, because assisting the course of justice is even more important than secrecy, or the confidential relationship between doctor and patient.⁴⁴

One isolated act is sufficient cruelty for a divorce, but is not sufficient to establish persistent cruelty in the Domestic Court. In that court the wife can rely upon section 1 (2) (b) of the Act of 1925 which reads :—

‘ . . . that her husband while suffering from a venereal disease and knowing that he was so suffering, insisted on having sexual intercourse with her ’.

Course of Conduct.

Cruelty by a course of conduct presents considerable difficulties because of the great variety of circumstances encountered.

Channel B. in *Kelly v. Kelly*⁴⁵ said :—

‘ It is obvious that the modes by which one of two married persons make the life or health of the other insecure are infinitely various, but as often as perverse ingenuity may invent a new manner of producing the result, the court must apply the remedy by separating the parties. The most frequent form of ill-usage which amounts to cruelty is that of personal violence, but the courts have never limited their jurisdiction to such cases alone ’.

There have been many cases of cruelty by a course of conduct before the courts, and to detect a consistent stream of principle flowing through them is not easy. We are often told each case must depend on its own facts, which is not very helpful. It is, however, clear that individual acts, not in themselves cruel, might by accumulation amount to cruelty.

Thus Shearman J. in *Hadden v. Hadden*⁴⁶ :—

‘ It has been urged by Mr. Holman Gregory, that this act and that act did not amount to cruelty. It is the old dilemma of the Greek philosophers, that as the addition of one grain of millet to another could not constitute a heap, a heap could never be formed. But the true test is that laid down in *Kelly v. Kelly* “ Many acts which are venial in themselves, become reprehensible when they take their place as parts of a system ” ’.⁴⁷

⁴³ *Garner v. Garner* (1920) 36 T.L.R. 196.

⁴⁴ *Per* Lewis J. with the approval of Lord Merriman P. in *C. v. C.* [1946] 1 All E.R. 562.

⁴⁵ L.R. 2 P. & D. 59 at p. 60.

⁴⁶ *Times*, December 5, 1919.

⁴⁷ Barnes J. in *Walker v. Walker* (1898) 77 L.T. 715 at p. 717: ‘ There were many acts which perhaps did not amount to cruelty but which were nevertheless admissible as evidence of general conduct’. Wilde J.O. in *Power v. Power* (1865) 4 Sw. & Tr. 173, . . . ‘ but cruelty lies in the cumulative ill-conduct which the history of the marriage discloses ’.

The following is a list, by no means exhaustive, of the sort of thing the courts have considered :—

(a) *Tyrannical Conduct*. The leading case is *Kelly v. Kelly*.⁴⁵ The husband was obsessed with an idea, that, on religious grounds it was his duty to make his wife completely subservient to him, and that she should be kept under strict discipline. Accordingly, he refused to sit at meals with her, insisted on occupying a separate room, put a control on the money allowed her, censored her correspondence and so on; he also called her a vile traitor and apostate and that she had given her confidence to another man, all of which resulted in the deterioration of the wife's health. The court, while agreeing the husband had no intention of hurting his wife, held that this conduct amounted to legal cruelty.

This case emphasises that physical violence is not necessary.

The case has been repeatedly followed and, for instance, in *Mytton v. Mytton*⁴⁸ the husband used harsh and irritating language and tyrannical conduct, and without using physical violence made the wife's life intolerable and injured her health; and Butt J. said :—

‘ Although I am not aware that there were any blows, still if the conduct of the husband is such as to endanger the life or health of the wife that is cruelty in every sense of the word whether we talk of legal cruelty or anything else ’.

In *Bethune v. Bethune*⁴⁹ the husband refused to share a bed with his wife, told her he loathed being in the same room with her, that he hated her presence and habitually neglected her. On one occasion only he gave her a violent push; and this conduct was held to be cruelty.

The following statement of Dr. Lushington in *Chesnutt v. Chesnutt*,⁵⁰ it is submitted, is not now good law :—

‘ However disgusting the use of the language charged, if proved, may be—however degrading habits of intoxication, however annoying to a wife especially the wife of a gentleman and a clergyman, these facts standing alone do not constitute legal cruelty. If it be said that the consequences to the wife are mental suffering and bodily ill-health I do not think that the case could be carried further. The same might be said of other vices; of gaming for instance; of gross extravagance, to the ruin of wife and family; all these occasion great mental suffering and consequent thereon bodily ill-health to the wife, but they do not constitute legal cruelty. Such consequences to be the subject of legal redress, must emanate from bodily ill-treatment and threats of the same ’.

⁴⁸ (1886) 11 P.D. 141 (quoted with approval in *Lauder v. Lauder* [1948] W.N. 477).

⁴⁹ [1891] P. 205.

⁵⁰ (1854) L.Sp.Ecc.Ad. 196.

(b) *Abusive and Violent Language.* The earlier cases seem to suggest that language alone (apart from threats) could never be cruelty.

Sir Wm. Scott in *Kirkman v. Kirkman*⁵¹ said that mere words of abuse, however reproachful, could not be cruelty. Dr. Lushington said the same of disgusting language in *Chesnutt v. Chesnutt*.⁵²

This hard doctrine has not been steadily followed in later cases. Harsh and irritating language, together with tyrannical conduct was held to be cruel.⁵³ It is also an element in *Bethune v. Bethune*,⁵⁴ *Waddell v. Waddell*⁵⁵ and *Pritchard v. Pritchard*.⁵⁶ Wilde J.O. in *Knight v. Knight*⁵⁷ thought the husband's unrestrained violence of language an important part of the husband's cruel course of conduct.

Finally, we come to the modern case of *Atkins v. Atkins*⁵⁸ where the cruelty consisted solely of a long history of nagging. Henn Collins J. said :—

'One knows that dropping water wears away the stone. Constant nagging will become completely intolerable, and though in the case of married life, you may be able to point to no single instance which could possibly be described as in common parlance "a row", yet nagging may be of such a kind, and so constant, that it endangers the spouse on whom it is inflicted'.

(c) *False Accusations.* False accusations, particularly of infidelity, have readily been held to be cruelty. We have already noted the quaint words of Sir F. Jeune in *Jeapes v. Jeapes*, who doubted whether leaving a wife to starve was legal cruelty, but he had no doubt in the same case that charging her falsely with infidelity was. Barnes J. in *Walker v. Walker*⁵⁹ said that he could conceive nothing more abominable and degrading than for a husband to make an unfounded charge of infidelity against his wife, and he was not sure the cruelty would not be equally great if the charge were true and the husband had condoned it, afterwards repeating the accusation.⁶⁰

In *Otway v. Otway*⁶¹ the husband followed his wife from room to room abusing her and accusing her of adultery and incest, and this was held to be cruelty. It is difficult to reconcile this case with *Gale v. Gale*,⁶² where Sir John Dodson said :—

⁵¹ (1807) 1 Hag.Con. 408.

⁵² (1854) L.Sp.Ecc.Ad. 196.

⁵³ *Mytton v. Mytton* (1886) 11 P. & D. 141.

⁵⁴ [1891] P. 205.

⁵⁵ (1862) 2 Sw. & Tr. 584.

⁵⁶ (1920) 37 T.L.R. 104.

⁵⁷ (1865) 4 Sw. & Tr. 103.

⁵⁸ [1942] 2 All E.R. 637. See also *Usmar v. Usmar* [1948] W.N. 207, where Willmer J. used similar language in a similar case.

⁵⁹ (1898) 77 L.T. 715.

⁶⁰ See also *Knight v. Knight* (1865) 4 Sw. & Tr. 103.

⁶¹ (1813) 2 Phillm. 109.

⁶² (1852) 2 Rob.Eccl. 421.

‘ Undoubtedly the charge of having committed incest is not per se sufficient to constitute legal cruelty ’, though he had added that coupled with averments of a substantial character it might form part of the libel.

A charge of incest, which did not affect the health of the other spouse, would not amount to cruelty, and in all these cases it must be understood that the conduct complained of only amounts to cruelty when the health of the spouse is thereby affected.

A modern case is *Davis v. Davis*,⁶³ where the wife had circulated false accusations of her husband’s adulterous intercourse with members of his congregations whilst Wesleyan minister in various places, and his health had suffered. Lord Merrivale granted a decree for judicial separation.

(d) *Adulterous Associations*. An adulterous association or flagrant infidelity does not in itself amount to cruelty, but to obtrude his infidelity on his wife’s attention, to flaunt his adultery before her, to force his paramour on his wife’s company or to debauch his servants in the same house as he is residing with his wife might be cruelty, if his wife’s health is thereby affected. Flirting with a woman to the wife’s distress the wife being in delicate health,⁶⁴ introducing the wife to loose women,⁶⁵ bringing a paramour home and sleeping with her in the same house as his wife,⁶⁶ installing his mistress in his house,⁶⁷ where his wife’s health was affected have all been held to be cruelty. As a wife can now get a divorce on the ground of adultery alone, without the necessity of proving cruelty as well, the discussion under this head is largely academic.

(e) *Coitus Interruptus*. The practice of coitus interruptus against his wife’s wish, and persisted in so that it injures her health, may amount to cruelty.⁶⁸

Following *Baxter v. Baxter*⁶⁹ and differing from *Rice v. Raynold-Spring-Rice*⁷⁰ Wilmer J. held this practice could not found proceedings for nullity on the ground of wilful refusal to consummate the marriage but held that it was cruelty :—

‘ I am not saying by any means that the practice of coitus interruptus is a ground in every case for pronouncing a decree on the ground of cruelty. The evidence of the doctor which I have heard is that there are many cases, where the parties are a normal man and a normal woman in which it does no harm to either of them, but where one gets a woman of a nervous disposition like this the practice as I understand it, may be most damaging to health. A husband must take his wife as he finds her, and if she is a woman of a type who needs the full

⁶³ (1921) *Times*, November 1.

⁶⁴ *Barrett v. Barrett* (1903) 20 T.L.R. 73.

⁶⁵ *Fenwick v. Fenwick* (1922) 38 T.L.R. 603.

⁶⁶ *Litton v. Litton* (1924) 40 T.L.R. 272.

⁶⁷ *Le Couteur v. Le Couteur* (1896) *Times*, March 2.

⁶⁸ *White (otherwise Berry) v. White* [1948] 2 All E.R. 151.

⁶⁹ [1948] A.C. 274.

⁷⁰ [1948] 1 All E.R. 188.

and natural completion of the act, to persist in withholding it from her, in the face of her repeated complaints and objections, is, in my view, an act of cold calculated cruelty. If, as in this case, it does result in serious injury to health or does contribute in marked degree to the breakdown in health of the other spouse, then, in my judgment, it is only right that this court should give relief. Therefore, I come to the conclusion that in this case the persistence in the practice of coitus interruptus although it does not enable me to say that the marriage has never been consummated, is, nevertheless, a matter which merits the condemnation of the court, and is abundantly sufficient to entitle the wife to the alternative relief claimed'.

(f) *Cruelty to Children*. In the Ecclesiastical Court it was the rule to allow allegations of cruelty to a child in the presence of the mother as evidence of cruelty to the mother.⁷¹

In *Birch v. Birch*⁷² Hannen J. thought that if the cruelty was done for the express purpose of wounding the mother's feelings to such an extent as to injure her health, that would be cruelty to her. This is an example of the heresy now exploded that an express intention to hurt was necessary for cruelty.

That cruelty to children may also be cruelty to the spouse has now received legislative approval by section 1 (2) and (3) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925.

It is submitted that cruelty to children, whether in the presence of the other spouse or not, and whether with intent to injure that spouse's feelings or not, will be cruelty if in fact it does injure his or her health.

(g) *Indifference and Neglect*. Although it has been said that mere coldness, or lack of affection cannot amount to cruelty, yet indifference and neglect may reach such a degree that it makes the married life of the other spouse intolerable, and if it affects that spouse's health, may amount to cruelty. The following are a few examples :—

1. A husband took no notice of his wife and child; never went out with them; seldom spoke to them and on one occasion struck his wife in the face when she complained about him coming home late.⁷³
2. Husband selfish; went and came as he liked; did not tell wife; attitude of indifference and dislike; no weekly allowance.⁷⁴
3. Husband refused to share bed with wife. Told her he loathed being in the same room with her and hated her presence. Habitually neglected her and refused to take her out.⁷⁵

⁷¹ *Suggate v. Suggate* (1859) 23 J.P. 121.

⁷² (1873) 28 L.T. 540.

⁷³ *Fenwick v. Fenwick* (1922) 38 T.L.R. 603.

⁷⁴ *Hadden v. Hadden* (1919) *Times*, December 5.

⁷⁵ *Bethune v. Bethune* [1891] P. 205.

4. Husband refused to occupy the same room as his wife; gave her insufficient money for household purposes; never went anywhere with her; ceased to speak to her; took no notice of child.⁷⁶
5. Husband ignored wife completely. Would not speak to her. In company treated her as though she did not exist, and habitually 'looked through' her.⁷⁷

The latest case in this line is *Lauder v. Lauder*,⁷⁸ where the husband was subject to moods and fits of depression during which he sulked and ignored his wife for many days on end, with serious effect to her health. All the judges in the Court of Appeal, Lord Merriman, Singleton L.J. and Pearce J., agreed that sending a wife to Coventry would be cruelty, but Singleton L.J. thought mere moodiness and sulkiness, when the husband ignored his wife for periods, even if it hurt her health, was not cruelty. He thought a spouse ought to take the other for better or worse, but on that basis there would be no divorce at all. Lord Merriman said there were two essential elements to be proved in a charge of cruelty: (a) something which could be called misconduct on the part of the husband, and (b) danger, actual or apprehended to the health of the wife. Until the House of Lords accepts this as an authoritative expression of the law, it is doubtful whether in the present state of the cases, the law can be stated as clearly as this.

(h) *Conduct to a Third Party*. Although the conduct complained of is usually directed against the wife herself, it need not necessarily be so. Conduct directed against a third party, without the intention of hurting the other spouse, may amount to cruelty, if the natural consequences are injury to the health of that spouse. Examples are indecent assaults,⁷⁹ indecent exposure⁸⁰ and homosexuality.⁸¹

(i) *Unnatural Conduct to Own Spouse*. It follows a fortiori, that if unnatural conduct is directed against the spouse, it will be cruelty. The difficulties here are proof of the offence, as corroboration is difficult to obtain; and also the negating of consent. Greer L.J. for instance thought that sodomy could never be considered an act of cruelty, because it could not be done without the other spouse's consent. No doubt attempted sodomy would be cruelty.⁸²

(j) *Miscellaneous*. Other examples of conduct amounting to cruelty are, damage to spouse's property,⁸³ conduct with the

⁷⁶ *Walmesley v. Walmesley* (1893) 69 L.T. 152.

⁷⁷ *Hamilton v. Hamilton* [1948] York Assizes (unreported).

⁷⁸ *Lauder v. Lauder* [1949] 1 All E.R. 76.

⁷⁹ *Thompson v. Thompson* (1901) 85 L.T. 172.

⁸⁰ *Bosworthwick v. Bosworthwick* (1901) 50 W.R. 217.

⁸¹ *Gardener v. Gardener* [1947] 1 All E.R. 630.

⁸² *Moss v. Moss* [1916] P. 263; *Statham v. Statham* [1929] P. 131; *N. v. N.* (1862) 3 Sw. & Tr. 234.

⁸³ *Forth v. Forth* (1867) 16 L.T. 574; *Horton v. Horton* [1940] P. 187.

deliberate intention of driving the other spouse away,⁸⁴ threats of suicide,⁸⁵ violent temper,⁸⁶ excessive sexual demands resulting in numerous miscarriages,⁸⁷ violent banging and moaning driving the wife almost to the verge of suicide,⁸⁸ extorting money,⁸⁹ persistently living on wife's means, pawning her property and continuously make her miserable,⁹⁰ keeping a large number of cats in the house.⁹¹

(k) *Bursell v. Bursell*.⁹² This is an unreported case heard by the Court of Appeal on April 26 and 27, 1948, and as it is a good example of a course of conduct which injured the husband's health, but which the court thought did not amount to cruelty, we think it is worth while rescuing it from oblivion.

The husband alleged that his wife was an incorrigible liar, before marriage (he met her abroad when he was a captain in the army and she a corporal in the A.T.S.) she had said her father was an officer in the Inniskilling Fusiliers, and she forged letters, alleged to be from her father. After the marriage the husband found out that he had been told a pack of lies, and the father was a poor peasant in Ireland. He was upset, not from a snobbish point of view, but by his wife's deceit. She denied him sexual intercourse for months after their marriage and flirted with other officers. When he got to England he received what the trial judge called a shattering blow—he found that his wife was a thief. This discovery made the husband, a sensitive young man, physically ill. He forgave her, but he found her out again in petty thefts, lies and dishonest and deceitful practices as to money, and his health was seriously affected, and not being able to stand this life any longer he broke up the matrimonial home.

The husband petitioned for divorce on the ground of cruelty, Wilmer J. giving leave to issue the petition within three years of the marriage, saying the allegations went to the foundation of marriage.

The case was heard at Leeds Assizes on July 30 and 31, and August 1, 1947, by Mr. Commissioner Stewart, who rejected the petition, first on the ground of lack of malignity by the wife, and,

⁸⁴ *Litton v. Litton* (1924) 40 T.L.R. 272.

⁸⁵ *Baker v. Baker* (1919) *Times*, December 11 (C.A.).

⁸⁶ *Martin v. Martin* (1860) 2 L.T. 118.

⁸⁷ *Rodwell v. Rodwell* [1948] York Assizes (unreported).

⁸⁸ *Weatherill v. Weatherill* [1947] Leeds Assizes (unreported).

⁸⁹ *Baker v. Baker* (1919) *Times*, December 11; *Le Couteur v. Le Couteur* (1896) *Times*, March 2; *Bertram v. Bertram* [1944] P. 59.

⁹⁰ *Bertram v. Bertram* [1944] P. 59.

⁹¹ *Winnan v. Winnan* [1948] 2 All E.R. 862.

⁹² [1948] C.A. (unreported). It is remarkable that a case so important as this should be unreported. Singleton L.J., in *Lauder v. Lauder*, *supra*, at p. 84, said it was a great pity cases of this kind were not reported. As far as one can see why some cases are reported and others not is a matter of luck. The writer had an experience recently where the Court of Appeal ordered a new trial but there was no shorthand note for the guidance of the court below. Surely there ought to be an official shorthand note of all judgments in the Court of Appeal, and the judges themselves should have some say in which cases are worthy of being reported.

secondly, because the allegations were not sufficiently grave or weighty, to amount to cruelty.

The Court of Appeal (Tucker and Evershed L.JJ. and Hodson J.) (the same court that tried *Squire v. Squire*) dismissed the appeal, agreeing with the commissioner's second finding.

Evershed L.J. said that in a case of cruelty he expected to find at least such conduct which *The Oxford Dictionary* would describe

as cruelty, and cited Bucknill J. in *Horton v. Horton*⁹³ that 'mere injury to health is not sufficient'.⁹⁴

Summing Up.

It is clear from the above examples that cruelty by course of conduct shows an almost endless variety of circumstances. Tentatively the following generalisations are suggested:—

1. The conduct must cause injury to health, or serious apprehension of it.
2. Acts of direct violence are not necessary.
3. Mere injury to health is not sufficient.
4. The married life should be looked at as a whole, and a few isolated incidents over a period of years will not amount to a course of conduct.
5. The conduct must be persisted in for a fairly lengthy period of time.
6. Malignity, or a direct intention to be cruel is not necessary.
7. Acts in themselves not cruel, may by accumulation amount to cruelty.
8. The danger to future safety need not be proved.⁹⁵
9. The individual reaction of the sufferer must be taken into account, *i.e.*, the court will recognise that a sensitive individual will suffer more than a more stolid individual.

Class Distinctions.

The law recognises that there are different classes of society. In considering what necessities a husband is liable for his economic position is taken into account. There is also authority for recognising this distinction in cruelty cases. Sir J. Nicholl in *Westmeath v. Westmeath*⁹⁶ says:—

' . . . a blow between parties in the lower conditions and in the highest stations of life bears a very different aspect. Among

⁹³ [1940] P. 187.

⁹⁴ In this case there were the two elements mentioned by Lord Merriman in *Lauder v. Lauder*, *supra*, namely, injury to the husband's health and misconduct by the wife. The husband was a sensitive young man who suffered from his wife's misconduct, and if that does not amount to cruelty it is difficult to say what does. If the wife had merely sulked, it might have amounted to cruelty, but because she was a persistent liar and thief it was not enough!

⁹⁵ *Smallwood v. Smallwood* (1861) 2 Sw. & Tr. 397; *Meacher v. Meacher* [1946] P. 216.

⁹⁶ (1827) 2 Hagg.Eccl.Supp. 59.

the lower classes blows sometimes pass between married couples who are in the main very happy and have no desire to part; amidst very coarse habits such incidents occur almost as freely as rude or reproachful words, word and blow going together. Still even amongst the very lowest classes there is generally a feeling of something unmanly in striking a woman . . . '

and now the learned judge becomes very eloquent :—

' . . . if a nobleman of high rank and ancient family uses personal violence to his wife, his equal in rank, the choice of his affection, the friend of his bosom, the mother of his offspring—such conduct in such a person carries with it something so degrading to the husband and so insulting and mortifying to the wife as to render the injury far more severe and unsupportable '.

Life in this country has become much more democratic and egalitarian since 1827, and while there are still wide disparities in wealth, it may be doubted whether the code of conduct is very different between the highest and lowest in the land.⁹⁷ This theme of class distinction in cruelty is noticeably absent from modern cases. A truer test, is perhaps, that suggested in the same judgment, namely, as to whether the conduct was resented at the time. There are some people who regard horseplay as a natural part of married life, and some wives who regard an occasional thrashing as a sign of their husband's affection. Naturally, if this sort of conduct is not regarded by them at the time as impairing their connubial happiness, it cannot be raked up at a later date, when affection has cooled, as cruelty.

The Individual Reaction.

Especially in 'course of conduct' cases a good deal depends on the reaction of the particular individual. What might be nothing more than mildly irritating to one person, might be torture to a more sensitive person. In this class of case the law is not concerned with the normal person, but with a particular individual.

In a recent case Lord Merriman said of sexual malpractices of one spouse with the other, that the test of just cause of one leaving the other was 'the known reaction' of one spouse to the other's actions.¹

Bucknill J. in *Barrett v. Barrett*² gives another example :—

' If a wife suffered from heart disease, to the knowledge of her husband, and he gave her a sudden shock, through which she might be in danger of death, such an act was not necessarily an act of actual violence, yet if the wife was so constituted as to be thereby made sickly or ill . . . the husband's act would amount to cruelty '.

⁹⁷ See *Buchler v. Buchler* [1947] 1 All E.R. 319, a case of desertion, where the Master of the Rolls deplored conduct based on class distinctions.

¹ *Holborn v. Holborn* [1947] 1 All E.R. 32.

² (1903) 20 T.L.R. 73.

Pearce J. in *Lauder v. Lauder*³ expresses it neatly : ' . . . the question is whether *this* conduct by *this* man to *this* woman or vice versa is cruelty '.

Persistent Cruelty.

By section 4 of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), a wife whose husband shall have been guilty of persistent cruelty to her may apply to a court of summary jurisdiction for separation and maintenance orders.

Persistent cruelty has never been defined, but the cruelty is the same as that required for a decree in the Divorce Court, with the additional qualification that it must be persistent.⁴

One act of cruelty which would be sufficient for a decree of dissolution of the marriage is insufficient for an order under this section.⁵ There must be a minimum of two acts⁶ and if they occur on one day it will be persistent cruelty. As Barnes J. trenchantly said in *Broad v. Broad*⁷ :—

' If there is cruelty on one day, why should it not amount to persistent cruelty? Is the wife to wait until she is half murdered? '

The case of *Cornall v. Cornall*⁸ is another illustration of the absurdity that cruelty which would have been sufficient for a divorce was not sufficient for an order under section 4 of the 1895 Act.

In *Goodman v. Goodman*,⁹ Lord Merrivale thought persistent cruelty meant cruelty continued over a period of time and persevered in, and added :—

' It does not mean a sudden act of violence or a sudden quarrel ',

but obviously, while one can agree with both these assertions, they give no guidance as to conduct which is less than the one or more than the other. This case really turned on condonation and therefore the expressions are obiter.

The following year the Divisional Court held that an assault in June, 1931, followed by one in October, 1931, after the parties had separated, was sufficient evidence of persistent cruelty.¹⁰

In a later case the husband assaulted his wife in 1928, followed by another assault in March, 1931, and a third in July, 1932.¹¹ There

³ [1949] 1 All E.R. at p. 90.

⁴ *Cornall v. Cornall* (1910) 74 J.P. 329, and see note 11 below.

⁵ *Rigby v. Rigby* [1944] P. 33. See *Barker v. Barker* [1949] 1 All E.R. 247, disapproving *Perks v. Perks* [1945] 2 All E.R. 492, where observations by Denning J. suggested that cruelty in the summary court need not be of so serious a degree as in the Divorce Court.

⁶ *Simcock v. Simcock* [1932] P. 94.

⁷ (1898) 28 L.T. 687.

⁸ (1910) 74 J.P. 329.

⁹ (1931) 95 J.P. 95.

¹⁰ *Simcock v. Simcock* [1932] P. 94.

¹¹ *Donkin v. Donkin* [1932] P. 17.

was also evidence of drunkenness and threats. The court thought there was sufficient evidence of a course of conduct which amounted to persistent cruelty.

The result is that a wide discretion is left to the justices, for their decision is largely one of fact. The decision often depends on the impression made by the parties in the witness-box, rather than on the number of assaults. Some justices are inclined to interpret 'wear and tear' of married life as 'rough and tumble' and allow considerable latitude to husbands, particularly if the parties come from the poorer classes.

Heresies.

Occasionally dicta are seized upon by judges, and it is only after a time that it is noted that the pure path of principle has been departed from.

Malignity. A recent example is the assertion that malignancy, or a deliberate intention to be cruel to the other spouse, was a necessary element of legal cruelty. This heresy has been traced to certain dicta in *Astle v. Astle*,¹² *Horton v. Horton*¹³ and *Atkins v. Atkins*,¹⁴ culminating in the decision of Finnmore J. in *Squire v. Squire*.¹⁵ Its history goes further back as will be seen from the argument of Sir E. Clarke in *Beauclerk v. Beauclerk*,¹⁶ who said :—

'If the acts of the husband are done without the intention of being cruel, they do not constitute legal cruelty'.

The Court of Appeal in that case, deciding on another point, made no comment on this argument.

The question came up in clear-cut form in *Squire v. Squire*¹⁷ in the Court of Appeal. The cruelty alleged was that the wife systematically for nights on end prevented the husband from sleeping, so that his health was affected. She herself was in bad health and her conduct was largely caused by this, and not with the intention of hurting her husband. Finnmore J., after referring to *Astle v. Astle*,¹⁸ *Horton v. Horton*¹⁹ and *Atkins v. Atkins*,²⁰ said :—

'All the cases emphasise, as I think, the cases before 1937 laid down the fact that cruelty must be deliberate, malignant and intended—whatever precise words you like to use'.

This statement of the law was unanimously rejected by the Court of Appeal which held that a person is presumed to intend the natural

¹² [1939] P. 415.

¹³ [1940] P. 187.

¹⁴ [1942] 2 All E.R. 637.

¹⁵ [1947] 2 All E.R. 582.

¹⁶ [1891] P. 189.

¹⁷ [1948] 2 All E.R. 51. See the excellent note by K. T. Samson in *Modern Law Review*, Vol. 2, No. 1, at p. 88, where he anticipated the decision of the Court of Appeal in this case and cogently criticised Finnmore J.'s judgment.

¹⁸ [1939] P. 415.

¹⁹ [1940] P. 187.

²⁰ [1942] 2 All E.R. 637.

consequences of his acts, adopting the pithy sentence of Shearman J. in *Hadden v. Hadden* ²¹ :—

‘ I do not question the evidence of the husband that he had no intention of being cruel to her, but I hold that his intentional acts amounted to cruelty ’.

This had been, indeed, said long before. In 1865 Lord Penzance had said in *Kelly v. Kelly* ²² :—

‘ He, the husband, says that he does not desire to injure her, and it has never been asserted that he does. But still she has nothing to hope for, for Mr. Kelly is acting in the discharge of a religious duty ’,

and the court held there was cruelty. This emphasises that the motive is immaterial, so long as his conduct injures the other spouse.²³

In view of all these authoritative statements and the well-known principle, that a person is presumed to intend the natural consequences of his acts,²⁴ it is difficult to see how the aberration crept in. The answer may be that in most cases, the respondent is malignant, and does intend to hurt the petitioner; or, at any rate, he or she knows that the conduct complained of does hurt the spouse, and nevertheless persists in it. It is an easy step to regard an element that occurs in most cases, as an essential element in all.

Then there are cases where malignity is important. The quality of an act can be affected by the intention behind it. Everyone knows that a slight blow given with hostile intent, can cause suffering, while hearty blows given in fun or play are disregarded. The court in *Squire v. Squire* was alive to this consideration, and Evershed L.J. said :—

‘ I do not say that proof of such an intention (*i.e.*, a spiteful or malignant intention) may not be an important or, in some cases, even an essential consideration ’.²⁵

Conduct Due to Illness. Another recent heresy is that illness is a sufficient excuse for cruel conduct by one spouse to another. This was the view of Finnemore J. in *Squire v. Squire*.

The Court of Appeal relying on views of Lord Stowell quoted above, held that illness (not amounting to insanity) was no excuse. Lord Simon in *Watt (or Thomas) v. Thomas*,²⁶ had already expressed a similar view :—

²¹ *Times*, December 5, 1919.

²² *Kelly v. Kelly* (1805) L.R. 2 P. & D. 59.

²³ Lord Stowell in *Holden v. Holden* (1810) 1 Hag.Con. 453, had said it was not necessary to inquire from what motive the treatment proceeded. ‘ If bitter waters are flowing, it is not necessary to inquire from what source they spring ’; and then in *Kirkman v. Kirkman* (1807) 1 Hag.Con. 409, the same judge said that if the safety of the spouse was endangered it was unnecessary to show that it proceeded from malignity; and in *Hall v. Hall* (1864) 3 Sw. & Tr. 347, the Judge Ordinary said ‘ With danger to the wife in view, the Court does not hold its hand to inquire into motives and causes ’, but he makes a saving with regard to madness, dementia or positive diseases of the mind.

²⁴ See *Edwards v. Edwards*, per Lord Merriman [1948] 1 All E.R. 157.

²⁵ [1948] 2 All E.R. 51 at p. 55.

²⁶ [1947] A.C. 484.

'Neither can the husband's right to a decree for cruelty be denied on the ground of the wife's pathological condition, which was producing increased nervous irritability'.

As Evershed L.J. pointed out,²⁷ all cruelty, not proceeding from malevolence, must proceed from some sickness, or disorder, of the mind, though in many cases falling short of insanity. On the other hand Tucker L.J.²⁸ was careful to make the reservation that the state of the health of the parties was a relevant consideration, and that there was a duty of a spouse to care for the other in sickness as well as in health.

Character. An incipient heresy may be detected in the following passage from the judgment of Bucknill J. in *Horton v. Horton*²⁹ :—

'If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think he establishes cruelty, merely because he finds life with her impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing him injury to health. In this case, the husband's health was not injured merely by the development and manifestation of the wife's character acting so to speak in its own sphere'.

With all respect, the reference here to character is obscure.

The writer can recall no similar reference in any other case, and Bucknill J. does not quote any authority to support his view.³⁰

The learned judge appears to be saying that if the respondent's conduct was due to her character it would not amount to cruelty. (Can we detect here a trace of the 'Malignant' heresy?) It is submitted, with all due respect, that this intrusion of 'character' is at least confusing, and might even be misleading. If the contention is that conduct otherwise cruel, is not cruel because it proceeds from the respondent's character, it is suggested that the reverse is more likely to be true.

It is recognised that if a man marries a woman and finds that her character develops in a way he does not like so that he loses affection, and he suffers unhappiness and even misery that might not be cruelty, but once the conduct exceeds a certain limit (or rather an uncertain and undefined limit) it will amount to cruelty. Lord Stowell's statement in *Evans v. Evans*³¹ supports this :—

²⁷ [1948] 2 All E.R. at p. 56.

²⁸ At p. 54.

²⁹ At p. 187; [1940] P. 187. See the argument of counsel in *Squire v. Squire* [1949] P. 52. 'If a wife does acts which endanger her husband's health it is no answer for her to say that she does those acts because she is a nasty person and they are the natural manifestations of her character.'

³⁰ At one time in the Ecclesiastical Court it was the practice to make general allegations against the respondent's character, e.g., that he was morose, but later this was discontinued: see *Evans v. Evans* (1790) 1 Hag.Con. 35; *Westmeath v. Westmeath* (1827) 2 Hagg.Ecc.Supp. 1, but the point here is that it was a question of pleading and, as in the present practice, the actual conduct complained of had to be set out.

³¹ (1790) 1 Hag.Con. 35 at p. 38.

‘ Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasionally sallies of passion, *if they do not threaten bodily harm*, do not amount to cruelty’.

It is suggested that the operative words are those italicised (our italics).

Wilde J.O. in *Forth v. Forth*³² said :—

‘ When a man married an ill-tempered woman, he must put up with her humour, but the moment she steps beyond that mark and lifts her hand to her husband, and subjects him to personal violence then the court must interfere’.

Moreover, personal violence is not necessary, if the extent of her temper is of such a degree as to affect the husband’s health.

Then there are the depraved conduct cases,³³ where the conduct was surely a defect of character. This is exemplified by the curious case of *Boyd v. Boyd*,³⁴ where Bucknill J. refused to allow constructive desertion by the husband after he had committed incest, and then was convicted of indecent assault, with disastrous consequences to his wife’s health. The judge held that the husband had not intended to drive his wife away, but suggested cruelty might be established. Lord Merriman in *Edwards v. Edwards*,³⁵ in expressing disapproval of Bucknill J.’s views on constructive desertion in *Boyd v. Boyd*, remarked that Boyd was just being ‘ his nasty self ’. That is to say, his behaviour was ‘ in the development and manifestation of his character acting in its own sphere ’, or, in other words, he did what he did, because it was his character to do so, and as Scott L.J. said in *Bertram v. Bertram*³⁶ :—

‘ Cruelty of character is bound to show itself in conduct and behaviour’.

It is evident from these quotations that having a nasty character is no excuse for cruel behaviour; on the contrary, it is more likely to prove that past bad conduct will be likely to be repeated in the future.

Conclusion.^{36a}

Lord Macmillan has said, and we can agree with him, that a court of law provides at the best but an imperfect instrument for the determination of the rights and wrongs of the most personal and intimate of all human relationships, that of husband and wife.³⁷ Therefore, at best, the court has a difficult task to perform, and if the principles involved are not clear their task is all the harder.

Among judges there appears to be two schools of thought. One

³² (1867) 16 L.T. 574.

³³ *Thompson v. Thompson* (1901) 85 L.T. 172.

³⁴ [1938] 4 All E.R. 181.

³⁵ [1948] 1 All E.R. 157.

³⁶ [1944] P. 59 at p. 60.

^{36a} Limitations of space have precluded a full discussion of possible defences to allegations of cruelty.

³⁷ *Watt v. Thomas* [1947] 1 All E.R. 590.

might be called a 'For better or for worse' school, which tends to stress that the spouse must put up with grave hardship before a decree on the ground of cruelty is granted. As was pointed out by Mr. Samson,³⁸ carried to its logical conclusion this line of argument would preclude divorce on the grounds of cruelty altogether.

On the other hand, there are others who take the view that once injury to health has been established, caused by the other spouse's misconduct, and the marriage is virtually broken up, relief should be granted. The number of dissenting judgments in recent cases on this subject is remarkable. This does show that, in spite of much judicial inquiry, practice and principles on this subject are by no means settled.

LIONEL ROSEN.

³⁸ See note 17, p. 342, *ante*.

STATUTES

LAW REFORM (PERSONAL INJURIES) ACT, 1948

THIS Act abolishes the defence of common employment and resolves the so-called problem of alternative remedies by determining the manner in which National Insurance benefits are to affect the measure of damages for personal injuries.

In this *Review* the passing of common employment can only be noted with relief and a sense of achievement. During its final stage the injustice of the rule was sharpened by the difficulty of predicting its operation which resulted from well-meaning judicial attempts to restrict its application. If there is anything worse than open injustice it must be capricious injustice. Common employment suffered this ultimate degradation when its application came to depend upon such distinctions as that between collisions of tramcars and collisions of buses. With these subtleties a fruitful source of litigation has disappeared so as to make it easier to settle out of court the increased number of claims for damages which must now be expected. The defenders of common employment predict an increase, not only of litigation, but even of industrial accidents, as the result of the abolition of the doctrine, because workmen will now be less careful to avoid accidents. It remains to be seen whether these fears are justified. Those who need reassurance on this matter may be comforted to know that the same argument was used when Workmen's Compensation was introduced. Even without common employment, there remain some powerful legal deterrents against carelessness, such as the defence of contributory negligence and the risk of civil and criminal proceedings.

The abolition of common employment in section 1 (1) is supplemented by the consequential repeal of the Employers' Liability Act, 1880, in section 1 (2), and by a provision, in section 1 (3), rendering void any agreement which would enable an employer to avail himself of the now proscribed defence. That it should have been thought necessary to provide against attempts to restore common employment through the medium of contract lends, posthumously, some colour to the implied term theory of the basis of common employment.

In section 2 the Legislature has given its answer to the question considered by the Monckton Committee, how far the right to damages for personal injury should be affected by the provision of National Insurance benefits. Following the advice of the Monckton Committee, the Legislature has rejected the solution which was adopted with regard to Workmen's Compensation, of putting the

injured person to an election between damages and benefits. It has also refused to make any inroads upon the common law right of action, or, still less, to abolish it altogether. But for the observations on this matter in the Beveridge Report no one could have seriously suggested that the time had now come to abolish the right of action for personal injuries. In giving the marginal title 'Measure of damages' to section 2, the Legislature has demonstrated its correct appreciation of the nature of a problem the solution of which had been bedevilled by describing it as that of 'Alternative Remedies'.

The Monckton Committee was divided on the question how the measure of damages should be affected by insurance benefits. The majority recommended that the value of all benefits, past and future, should be taken into account in diminution of damages; the minority proposed that benefits should be ignored. The present Act adopts in section 2 a compromise solution: one half of the value of certain benefits (industrial injury, industrial disablement, or sickness benefits, including industrial disablement gratuities, section 2 (6)), received and expected for the five years following the accident, are to be deducted from damages awarded for loss of earnings or profits. This compromise resembles the proposal made by the Trades Union Congress (at p. 17 of the Final Report of the Departmental Committee on Alternative Remedies, Cmd. 6860) that employed persons should recover damages in full and in addition be entitled to 5/12ths of the amount of benefit, as representing their own contributions to the Insurance Fund. The rule now adopted, however, makes no pretence of relating the amount of benefit to be retained to the injured person's contributions. Still less is it possible to find in it an expression of the principles upon which the recommendations of either the majority or the minority of the Monckton Committee were based, the former proceeding from Sir William Beveridge's axiom that 'an injured person should not have the same need met twice over' and that 'he should not in the end get more from the two sources than he would have got from one alone', the latter from the analogy of private accident insurance. Both lines of reasoning are unconvincing and an arbitrary solution is, therefore, less open to objection—although, as a compromise, it combines the practical disadvantages of both extremes.

The most serious of these disadvantages would seem to be the need to estimate the value of future benefits. The difficulty of this task which is due to the fact that benefits vary with the needs and circumstances of the insured person had been convincingly demonstrated by another dissentient of the Monckton Committee, Mr. F. W. Beney K.C. The Act has sought to simplify the problem of forecasting the future by providing, in section 2 (2), that any increase of an industrial disablement pension arising from the need for constant attendance shall be disregarded, and, of course, by limiting the period in respect of which an assessment must be made

to five years. Even so, the difficulty remains a formidable one and may easily lead to litigation. If these fears should be confirmed in the future, the remedy will be obvious: in accordance with Mr. Beney's advice, to restrict guessing to a minimum, the period of guess should be reduced from five years to one more likely not to exceed the usual interval between accident and judgment, with, if this still appears desirable, a corresponding increase in the proportion of benefit to be deducted from damages, bearing in mind that in most cases benefits are only payable during the months immediately following the accident. There seems little merit in the choice of a five-year period which may have been suggested by the machinery for quinquennial reviews of rates of benefit under section 40 of the National Insurance Act, 1946, and section 59 (1) (a) of the National Insurance (Industrial Injuries) Act, 1946.

The Monckton Committee thought that the task of the courts in estimating future benefit would be simplified by the rules as to the burden of proof which require that the defendant should prove the likelihood of such benefit to the satisfaction of the court. It will be interesting to see whether the courts will act on this rule. Mr. Beney pointed out that it carries with it an element of inequality since 'the injured person, whose industrial future at the date of the trial can be reasonably foreseen and whose domestic position appears to foreshadow no probable changes, will suffer a very large deduction; whilst the injured person whose future in these respects is quite uncertain, will not'.

The final clause of section 2 (1), which relieves the court of finding separately the amount of damages and the amount of benefit to be set off against it, must be read as concerned only with the form in which judgment is to be given. It is probably intended to discourage appeals and it may help to prevent the establishment of a uniform scale of estimated benefits.

Although the Act bears the character of a compromise, it seems closer to the views of the dissenters than those of Sir William Beveridge and of the majority of the Monckton Committee. This preference for the minority proposals is shown again in the provision directing set-off of benefit against only one of the several heads of damage, namely, loss of earnings or profits. It is particularly welcome that on this point Mr. Beney's views, based on a most persuasive refutation of the majority's arguments, should have prevailed so as to ensure an undiminished award of the important head of damages for pain and suffering.

Section 2 (3) deals with the relation of contributory negligence or other causes justifying apportionment of damages to the deduction of benefit from damages. On this question the Monckton Committee proposal has been adopted. The effect of contributory negligence will be considered after benefit has been deducted so that only the net amount awarded will be apportioned, which is the solution most favourable to the plaintiff's interests.

The subject-matter of section 2 (4) might have merited a separate section as it is no longer concerned with the impact of National Insurance upon common law damages but with the effect of the introduction of the new National Health Service. At a time when this service was only contemplated, the Monckton Committee had recommended that a plaintiff should be allowed to recover the cost of medical services even if these could have been obtained free of charge but continued that the position might be 'radically altered if a comprehensive health service is introduced'. Section 2 (4) affirms the right to claim medical expenses in a manner almost exceeding the recommendation of the Committee by precluding the court from asking whether the plaintiff's refusal to avail himself of the free medical services was reasonable in the circumstances. This provision, therefore, gives striking proof of the optional character of the National Health Service.

Section 2 (5) provides that the right to benefits resulting from death shall not be taken into account when damages in respect of that death are claimed under the Fatal Accident Acts or under the Carriage by Air Act, 1932. This subsection thus maintains, with regard to National Insurance the rule followed in the past in regard to Widows', Orphans' and Old Age Contributory Pensions.

The remaining sections give definitions, in section 2 (6) and section 3, make the Act binding on the Crown, section 4, exempt Northern Ireland from its operation, section 5 (2), but facilitate, in section 5 (1), the passing of corresponding legislation by the Northern Ireland Parliament, and finally, in section 6, determine the short title and commencement of the Act.

The very brevity of the Act invites comparison with the extensive list of recommendations, summarised under eighteen heads, of the Committee upon whose labours the Act is based. The case for the abolition of common employment was strong enough for the immediate action of Parliament. On the principal question of the measure of damages, the views of the Committee were not followed; the other important recommendations of the Committee, concerning the conversion of absolute into qualified statutory duties, notice of accident and the period of limitation for actions in tort, have simply been ignored. On the other hand, the Monckton Committee has done valuable and effective work in resisting attempts to treat the establishment of National Insurance as a concession to workmen which would require to be balanced by reducing the legal liabilities of employers. It is, therefore, chiefly through its negative recommendations, which have all been adopted, that the Monckton Committee has justified its existence and indeed the practice of legislation after consultation of expert committees, which is in accordance with the traditional procedure of law reform and with the convictions of this Government of disciples of the Webbs.

J. UNGER.

REPORTS OF COMMITTEES

THE LONDON DECLARATION OF THE COMMONWEALTH PRIME MINISTERS,
APRIL 28, 1949

THE British Commonwealth owes much to the fact that its statesmen have been endowed with what Professor W. K. Hancock once called 'an incorrigible disposition to escape from a logical dilemma'.¹ In April, 1949, the Commonwealth Prime Ministers produced a declaration which may well prove to be one of the great constitutional documents of modern times, but which is certain to prove the despair of constitutional theorists. India's intention to become a 'sovereign independent republic' and to eliminate the Crown from her future constitution was reconciled with her desire to remain a full member of the Commonwealth. In order to effect this reconciliation the London Declaration finally discarded the theory that membership of the Commonwealth necessarily entails allegiance to the Crown. Allegiance is a notoriously vague conception, but the 'Balfour Declaration' of 1926 and the preamble to the Statute of Westminster, 1931, formally recited that the members of the Commonwealth were united by a common allegiance to the Crown, and in 1931 it was generally assumed that common allegiance was the one vital characteristic of the Commonwealth relationship. Difficulties were soon created by the behaviour of the Irish Free State, which, although defined as a Dominion by the Statute of Westminster, proceeded to abolish the oath of allegiance and the office of Governor-General and to purport to exclude its citizens from the category of British subjects. The Eire Constitution of 1937 made no reference to the Crown, except by an oblique allusion to the Executive Authority (External Relations) Act, 1936, which provided that so long as the Free State was associated with the members of the British Commonwealth the King could act on her behalf for appointing diplomatic and consular agents and concluding international agreements. Thereafter Eire was externally associated with the Commonwealth; the External Relations Act was her sole legal connection with the Crown. Yet when the 1937 Constitution came into force the United Kingdom Government issued a statement to the effect that it was not prepared to treat the new Constitution as effecting a fundamental alteration in Eire's position in the Commonwealth. Eire continued (at least until 1939) to enjoy most of the advantages of membership of the Commonwealth. In English law, moreover, her status was unchanged, and her citizens were still regarded as British subjects.²

¹ *Survey of British Commonwealth Affairs*, Vol. 1, p. 5.

² *Murray v. Parkes* [1942] 2 K.B. 123.

Neither Eire's neutrality during the war, nor the provision of the British Nationality Act, 1948, that citizens of Eire were no longer British subjects, were regarded as marking the secession of Eire from the Commonwealth. The decisive step was taken by Eire herself when she repealed the External Relations Act by the Republic of Ireland Act, 1948. External association was at an end; the last tenuous link with the Crown had been severed and Eire had seceded from the Commonwealth.

To generalise from particular instances is a familiar method of inviting disaster, and the dangers are overwhelming when the generalisation relates to the British Commonwealth and the particular instance is that of Eire. But it seems likely that the Commonwealth statement may have been influenced in some measure by the case of Eire when addressing themselves to the problem of India. Since Eire was a member of the Commonwealth until 1949, it was clear that India could remain in the Commonwealth without professing allegiance to the Crown. Since, however, Eire had seceded by snapping the link with the Crown, it was arguable that India could hardly remain a member without acknowledging some connection with the monarchy. The latter argument could be countered by pointing out that when Eire had repealed the External Relations Act she had also expressed her intention to secede from the Commonwealth. If, like India, she had wished to remain within the Commonwealth and to play her full part in its elaborate system of consultation and collaboration, the other members of the Commonwealth might have been less ready to assume that severing the link with the Crown meant secession. Hence, although the case of Eire showed that India could remain within the Commonwealth without professing allegiance, it did not prove conclusively that India had to retain a link with the monarchy. But two other arguments were advanced in support of the view that some such link had to be retained by India. In the first place, many commentators put forward the nebulous argument that the status of the monarchy would be diminished and the strength of the Commonwealth diluted if India were permitted to retain the benefits of membership while dissociating herself entirely from the monarchy. In the second place, there was the all but unanimous opinion that some institutional symbol of Commonwealth unity must be accepted by all the member nations in order to justify to foreign countries the theory that the Commonwealth occupies a special position in international law. Hitherto the main applications of this theory have been the contentions (a) that the relations of Commonwealth countries *inter se* are not in all respects governed by the rules of international law, and (b) that the system of imperial preference is unaffected by the 'most-favoured-nation' clauses embodied in commercial treaties with foreign countries,

because for this purpose the nations of the Commonwealth are not distinct 'nations'.³

In these circumstances the Commonwealth statesmen thought it necessary to work out a formula linking India with the monarchy. The main obstacle was India's refusal to make use of the King for any function, however formal. Accordingly, the following formula was evolved:—

The Government of India have . . . declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth.

The Governments of the other countries of the Commonwealth, the basis of whose membership of the Commonwealth is not hereby changed, accept and recognise India's continuing membership in accordance with the terms of this declaration.

In the preamble to the Statute of Westminster, the Crown was similarly described as the symbol of the Commonwealth association. Here 'King' is substituted for 'Crown', and the peculiarly intimate and personal role of the monarchy is emphasised.⁴ But whilst the King will be called the Head of the Commonwealth, he will soon cease to be the King of one of its most important members. Not only will he cease to be King of India, but he will cease to exercise any personal or constitutional function in relation to India, because to Indian Nationalists the monarchy symbolises the British Raj. Yet the declaration paradoxically treats the King as the symbol of India's association with the other members of the Commonwealth. Although it is easy to show why the King was chosen to symbolise this relationship, it seems impossible, where India is concerned, to attribute to the monarchy any material (as distinct from formal) significance as a bond of unity.⁵

Some other aspects of the declaration call for brief comment.

(1) In designating the Commonwealth, the declaration uses the phrases 'Commonwealth of Nations' and 'British Commonwealth of Nations' with what appears to be a nice discrimination. Mr. Attlee has since stated⁶ that it is not intended to lay down any rigid rule as to the use of the word 'British', or even to proscribe the term 'British Empire'. The terms 'British Commonwealth' and 'British Commonwealth of Nations' are the most appropriate, but they are unlikely to be used where the Asiatic

³ For some recent criticisms, see F. R. Scott (1945) 23 Can.Bar Rev. 725, 742-4; R. C. Snyder, *The Most-Favoured-Nation Clause* (1948), pp. 170-1.

⁴ Cf. Dr. H. V. Evatt: 'A crown is a chattel which is stored in the Tower of London except on ceremonial occasions, but the King is the head and pivot of the British Commonwealth of Nations' (reported in *The Times*, January 14, 1949).

⁵ For the contrary view, see *The Round Table*, June, 1949, p. 203; Lord Pethick-Lawrence in *The Contemporary Review*, June, 1949, p. 321.

⁶ 464 H.C. Deb. 644 (May 2, 1949).

countries are concerned. Sir Ivor Jennings has recently put forward a strong plea⁷ for abandoning the term 'Commonwealth and Empire', which dependent peoples find particularly objectionable. He suggests using 'Commonwealth' as the generic term, and 'dependent territories' where it is necessary to describe the colonies, trust territories and other dependencies separately.

(2) When in 1947 the Secretary of State for the Dominions became the Secretary of State for Commonwealth Relations, the terms 'Dominion' and 'Dominion status' were already passing out of the semi-official vocabulary of the Commonwealth. They do not appear anywhere in the Declaration, and they will no doubt fall gradually into desuetude, to be replaced by a variety of complicated circumlocutions.

(3) Although India will no longer owe allegiance, citizens of India remain (at least for the present) British subjects in English law; and the status of British subjects has always been said to carry with it the fundamental duty of allegiance. But the constitutional history of the Commonwealth has produced a rich crop of legal anomalies such as this. The evolution of the Commonwealth has perhaps been the highest achievement of the British genius for politics, and the politicians can say with some justification that this sphere of politics is too serious a matter to be left to the lawyers.

S. A. DE SMITH.

FINAL REPORT OF THE COMMITTEE ON COUNTY COURT PROCEDURE
(CMD. 7668)

THOSE familiar with the practice of the county courts will not be surprised at the general opinion expressed by the Committee on County Court Procedure that in general those who resort to them are satisfied with their working and that this satisfaction is well founded. In the course of the century or so in which they have been functioning those courts have played a vital role and obtained for themselves a secure place in the administration of justice in this country. True it is that they have perhaps lost something in that period of their character of a poor man's tribunal, but this is probably due not so much to any inherent vice in their constitution but to the inevitably high cost of litigation under a system which emphasises the importance of *viva-voce* evidence in court, and also requires the maintenance of the legal profession in two separate branches. But as with all live institutions there is always room for improvement, and the Committee, after a careful and detailed survey of most of the main aspects of the procedure of the county courts, make a number of valuable suggestions in a reforming spirit. Although the Committee speak of some major and a large number

⁷ *The Times*, May 14, 1949, and June 6, 1949.

of minor improvements, in fact all the proposed changes seem to be matters of detail rather than anything of a fundamental character.

A previously published Interim Report (noted at Vol. 11, p. 470) has already dealt with the vital question of the arrangement for the hearing of actions tried by the judge, a matter which probably gives rise to the most numerous grievances, legitimate or illegitimate. The main proposals in the present final report are as follows:—

(1) The registrar's jurisdiction¹ should be increased to £20 provided the judge has given leave (which may of course even now be given generally under Order 48, r. 6) and neither party objects; and that by leave of the judge, and if the parties so desire, any action within the county court jurisdiction should be triable by the registrar. This is an obviously sensible proposal, though perhaps a little more doubt may be felt about some of the more detailed suggestions, *e.g.*, that the registrar should be given power to enter judgment on the report of a referee under the Landlord and Tenant Act, 1927, where both parties accept the report. The provisions of that Act are notoriously difficult to construe and apply, and it seems a little unfair that a party should be put to the possible extra expense of an appeal to the judge where he has not agreed to accept the jurisdiction of the registrar.

(2) The idea of reducing all types of proceedings to one common form, though having the attraction of simplicity, did not recommend itself to the Committee. In particular the Committee feel that both the ordinary and default procedure should be retained. A proposal that all the London courts should be centralised in one building was rejected on the grounds that no such building could in fact be provided under present conditions, and also because it was thought that such centralisation would deprive the courts of their individual and popular character. The Committee did, however, recommend that consideration should be given to setting up a central court in London for the more substantial cases when it becomes possible to provide a suitable building. Such a scheme would certainly be of value in preventing lists getting congested in other courts, especially if regard was had not so much to the sum involved in a case, as to the complexity of the issues of law or fact which it might give rise to.

(3) The Committee make a number of useful recommendations directed towards simplifying the service of process, and in

¹ A suggestion was considered by the Committee that in every case there should be a preliminary hearing before the registrar attended only by solicitors or the litigants in person, at which directions should be given for the trial, so that the real issues might be defined and thereby the ultimate hearing simplified and shortened. The proposal was rejected on the ground that it would cause added inconvenience and expense by requiring two attendances instead of one, but it may be thought that, although inappropriate in the county court, in the High Court such a preliminary hearing before a Master, or perhaps even the judge, would be an experiment worth trying.

particular propose that service of an ordinary summons should be by 'A.R.' registered post.

(4) Despite the objections of the Bar Council, the Committee recommend that a solicitor should be permitted to retain another solicitor as his agent to conduct his case in court. It is recognised that this practice is in fact pursued at present notwithstanding the provisions of section 86 of the County Courts Act, 1934, and the Committee is in favour of its formal recognition. This certainly seems a little hard on the Bar, but it must be admitted that it is probably impossible in this instance to reconcile fully the interests of that sorely-trying branch of the profession with those of the public, and this proposed change is perhaps to be regarded as another small step tending toward the ultimate fusion of the two branches.

(5) The Committee are not in favour of reducing the formality of county court proceedings. Experience indeed shows that litigants in person and witnesses are by no means overawed by the mode of proceeding in county courts and are generally ready enough to speak their mind, and there seems nothing to be gained by depriving those courts of the dignity and authority with which some measure of formality invests them. Some proposals are, however, put forward for relaxing the rules of evidence, *viz.*:—

- (a) Secondary evidence of a document should be admitted without a notice to produce having been served unless it appears that there is a genuine dispute as to the authenticity of the document.
- (b) Written statements under the Evidence Act, 1938, should be admitted in cases where the maker thereof is not called as a witness, even where the court is not satisfied that undue delay or expense would be caused by calling him as a witness. Further, statements should not be excluded merely because made by a 'person interested' as this goes to credibility rather than admissibility. It may be thought that this last argument applies with equal cogency in relation to the whole body of rules of evidence and that there is much to be said for the view that, subject to exclusion on the ground of irrelevance, a judge sitting alone should be entitled to listen to any evidence that is proffered and give to it whatever weight he thinks it merits. Many of the existing rules of exclusion,² though no doubt vital where a jury is involved, seem to smack of the old fallacy which precluded parties to an action giving evidence on their own behalf, an obsolete notion which the limitation as to 'persons interested' in the Evidence Act does something to revive.
- (c) The court should have power to admit unstamped documents in evidence, but subject to the document being

² 'Admirably adapted to the exclusion of truth', as they were once described.

impounded and forwarded to the Commissioners of Inland Revenue, who may recover the appropriate duty and penalty. This would certainly obviate injustice in many cases where the usual solicitor's undertaking is not obtainable or where the document cannot lawfully be stamped after execution.

(6) The repeal of section 1 (1) of the Courts (Emergency Powers) Act, 1943 (which relates to money judgments founded on contract) is recommended so far as it relates to county courts. Since those courts have power anyhow to suspend any judgment for the payment of money where the defendant's inability to pay is due to any cause, including war circumstances, this provision is really unnecessary and merely creates further delay and expense. It may be added that the time would seem overdue for the general repeal of the Courts (Emergency Powers) Act, 1943.

(7) The Committee refer to the familiar difficulty of enforcing judgment summonses owing to the need for an inquiry as to the debtor's means to be held in his presence before enforcement by imprisonment can ensue. It is suggested that some assistance can be obtained from Order 25, r. 2 (4), whereby an order for the oral examination of the debtor as to his means can be obtained. Disobedience to such an order can result in attachment. Even here, however, there is no provision for the more suitable expedient of apprehending the debtor who neglects to attend the hearing and bringing him before the court at an adjourned hearing of the summons. Since new legislation can alone confer this power upon the court, the Committee recommend that suitable legislation be introduced to this end.

(8) The Committee make a welcome proposal to revise the present obscure position relating to the costs of a judgment summons, and to substitute for the present rules a general discretion in the judge to award costs. It has long been a sore point with creditors that they can be forced by a recalcitrant judgment debtor to make repeated applications to the court to try and secure the satisfaction of a judgment, and yet they will get no costs on any such applications, or far less than the needs of the situation reasonably warrant.

(9) Perhaps the most important changes proposed are those relating to costs. It is well-known that, speaking generally, the present scales are not over-generous judged by present-day professional standards, and the Committee found it impossible to justify any general reduction in the charges allowed to a solicitor. Indeed they point out that no such reduction was in fact suggested by any witness who gave evidence before them. On the other hand they accepted the criticisms that the present scales do not adequately remunerate solicitors in contested actions, and further that in ascertaining the appropriate scale the difficulty of the case and the quantity of work entailed should be considered and not

merely the amount involved. The Committee also agreed that it ought not to be more profitable, as is frequently now the case, for a solicitor to entrust a clerk with the preparation of a case and then instruct counsel thereon, than to prepare and conduct it himself. To meet these criticisms it is proposed to substitute for the existing 5 scales, three scales as follows:—

No. 1—amount recovered or claimed exceeds £2 but does not exceed £10.

No. 2—amount exceeds £10 but does not exceed £20.

No. 3—amount exceeding £20.³

To allow for more flexibility it is proposed that in the case of certain items in scale 3 there should be a low minimum and a high maximum to enable the registrar to have regard to all the circumstances of the particular case on taxation. In particular, both scales 2 and 3 provide for an inclusive fee for preparing for trial which ranges, under scale 2, from 10 shillings to £3, and under scale 3, from 10 shillings to £15.⁴ Where the action is conducted in court by the solicitor without counsel the range of fees is to be from 10 shillings up to £3 under scale 2, and up to £10 under scale 3. As regards counsels' fees, concerning which the Committee recorded that they had received no complaint that they were excessive,⁵ the only substantial change is that the maximum fee, *viz.*, £8 13s., will now be permissible on a claim exceeding £20, instead of being restricted to an action involving more than £50 as at present.

Space will not permit of detailed reference to other proposed amendments regarding costs, save to indicate the Committee's sensible suggestion that Order 47, r. 13 (which at present allows the court to award costs on a higher scale where the question in dispute is of importance to a class of persons or involves a difficult question of law) should be extended to cases involving a question of fact of exceptional complexity, but should omit the provision regarding questions of importance to a class, for in the latter case there seems no reason why an unsuccessful party should have to pay costs

³ The Committee considered but rejected the proposed scale of costs prepared by the Law Society to give effect to the recommendations of the Rushcliffe Committee. The rather unsatisfactory result may therefore be that there will be two varying scales according to whether the litigant is within the Legal Aid Scheme or not.

⁴ Perhaps an inducement to deliver detailed instructions to counsel rather than their all too familiar substitute, an empty back-sheet.

⁵ It is noteworthy that the British Medical Association suggested that a medical witness of fact should be allowed a *minimum* of ten guineas per whole day and seven guineas per half day, and that a medical witness called as an expert should be allowed a *minimum* of ten guineas per day for qualifying and twenty-five guineas (1) per day or fifteen guineas per half day for giving evidence. The Committee felt unable to recommend that the present limits (three guineas for qualifying and eight guineas for attending court) should be raised, but the medical profession's own valuation of its services affords an illuminating contrast with the maximum of eight guineas which can be allowed to counsel for preparing for the case and undertaking the whole conduct of it at the trial.

on a higher scale for the privilege of having assisted in clarifying the law for the benefit of some section of the public.

(10) There are at present 389 forms for use in county court proceedings and the Committee, while suggesting some small improvements in detail, were unable to recommend any large-scale pruning. They also were of opinion that existing nomenclature should be retained even where rather forbidding in appearance to the layman, *e.g.*, the use of the word '*præcipe*'. On the whole there does seem to be a good deal to be said for not making a document into a jack-of-all-trades merely in the interests of uniformity. It should suffice if an official document, especially in a layman's court, is conveniently adapted to the particular type of proceeding and that it is clear on the face of it what the recipient is to do and what will happen if he fails to do it.

(11) The absence of anything in the nature of a law library in county courts is inevitably a matter of mournful reflection to the advocate who finds himself under the necessity of trailing a large number of bulky volumes to a distant court. The Committee do not feel it within their province to make recommendations as to any particular publications, but they record the modest requirement of the Council of Judges of County Courts that a set of *Halsbury* should be available on every circuit, and go on to express the opinion that it is of great importance from the point of view of despatch of business that such books as the judge thinks necessary should be available on each circuit.

Finally it may be added that the Committee quote the Civil Judicial Statistics for 1947 as revealing that in that year there were 139,893 county court actions determined by consent, or on admission, or in default of appearance or defence, and 25,726 contested actions. For tribunals which dispose of litigation on such a scale, it would be no reflection on their efficiency if a permanent committee were appointed, drawn from a wide range of persons and whose personnel would change from time to time, and which would have the function of keeping the whole working of the system under continuous review and making proposals for improvement as and when they appeared necessary.

DENNIS LLOYD.

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W. A. STEINER.

NOTES OF CASES

THE JURISDICTION OF RENT TRIBUNALS

R. v. Paddington and St. Marylebone Rent Tribunal, Ex p. Bell London and Provincial Properties, Ltd. [1949] 1 All E.R. 720, deserves special attention for two reasons. It is one of the most important cases yet decided on the interpretation of the Furnished Houses (Rent Control) Act, 1946, and it raises issues of outstanding general interest on the relationship between administrative tribunals and the ordinary courts.

The facts were that, purporting to act under powers given by section 2 (1) of the Act, the Paddington Borough Council referred to the tribunal the contracts of all but two of a block of 555 flats. The original block reference was improperly made out, and the council subsequently referred 302 of the contracts individually. Four of the flats were not subject to the Act; 332 of the others were subject to the Rent Restriction Acts, and therefore the tribunal had no power to reduce their rents: *R. v. Paddington and St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.* [1947] K.B. 973. All were described as furnished though the majority were not, and the names of some of the lessees were given incorrectly. The rents of the two flats not originally referred by the council had previously been referred by the tenants to the tribunal, which had reduced them. The remainder were referred by the council in pursuance of a decision by its Public Health Committee that where two or more reductions of rent had been made by the tribunal in the case of any property, all other contracts of letting to which the Act applied relating to that property would be referred to the tribunal. The tribunal considered the rents of eight of the furnished flats and ordered them to be reduced (though in ordering the reductions it was influenced by a misinterpretation of earlier cases on the Act: see *per* Lord Goddard C.J. at pp. 728-9). At the hearing the representative of the council explained the reason for the references, but called no evidence and did not cross-examine the witnesses for the landlords. The landlords moved for certiorari to quash these eight determinations, and prohibition to order the tribunal not to proceed with the other references.

Lord Goddard C.J., delivering the judgment of the Divisional Court, held that the proceedings were bad *ab initio* because the action of the council in referring all the flats without ascertaining the wishes of the tenants and without inquiring into the facts of each individual case was not a bona fide exercise of its powers under the Act. The Act was 'designed for the protection of the tenants and not for the penalising of landlords'. A further reason for ordering

certiorari was that the landlords had been given no opportunity to deal with one of the points mentioned by the tribunal in announcing its decision to reduce the rents. This was that the flats did not come up to present-day standards because in no case were the ceilings more than eight feet high. Members of the tribunal had noted the height of the ceilings before the hearing while inspecting the flats in the presence of two of the landlords' employees, one of whom had agreed that it was less than was required by modern standards. 'Surely', said his Lordship, 'in common fairness, if this was to be considered by the tribunal, they ought to have given the applicants some opportunity of dealing with it In our opinion to take into account a matter of this kind, of which no intimation had been given to the landlords, brings this case exactly within the decision of the House of Lords in *Board of Education v. Rice*, the judgments in which are so well known that we need not set them out.'

The first part of the judgment rests on the assumption that, if it be accepted that the local authority used its statutory powers for a purpose alien to that for which they were conferred, then it must be accepted that the reference was invalid. It is submitted, with great respect, that this assumption is not well founded. An attempt might perhaps be made to justify the assumption in the following manner. First, it might be said, if a tribunal reduces the rent of premises with respect to which there is no contract to provide services or furniture and which are not *in fact* furnished, it has acted outside its jurisdiction and its decision will be quashed: *R. v. Blackpool Rent Tribunal, Ex p. Ashton* [1948] 1 All E.R. 900. If, therefore, the local authority refers such premises to a tribunal, prohibition will lie to prevent the tribunal from entertaining the reference. (It may be observed at this point that in many cases the courts have conceded to inferior tribunals the right to determine conclusively the existence of facts on which their jurisdiction depends: see, e.g., *R. v. Minister of Health* [1939] 1 K.B. 232; *R. v. Ludlow, Ex p. Barnsley Corporation* [1947] K.B. 634; *D. M. Gordon* in (1944) 60 L.Q.R. 244.) Secondly, a local authority may act *ultra vires* by using its statutory powers for an improper purpose (*détournement de pouvoir*) as well as by exceeding them. Assuming that the Divisional Court was right in holding that the local authority had misconceived the purpose of the relevant section of the Act, then surely (it might be said) the reference in the present case was as bad as a reference in the first type of case would be. These arguments, however, fail to recognise the places of the tribunal and the local authority in the scheme of the Act. The Act is intended to give the tribunal a very substantial measure of independence of the ordinary courts. Thus, the courts will not order certiorari solely on the grounds that a tribunal has failed to take into account matters which it ought to have taken into account,

or has otherwise come to an unreasonable conclusion, when determining what is a fair rent : *R. v. Paddington and St. Marylebone Rent Tribunal, Ex p. Kendal Hotels, Ltd.* [1947] 1 All E.R. 448. Again, a tribunal, if satisfied that a reference made by a tenant is frivolous or vexatious, is empowered by section 2 (6) not to entertain it. Where a local authority has made a capricious reference—a contingency for which Parliament, perhaps over-optimistically, omitted to provide—the obvious solution is for the tribunal to dismiss the reference preemptorily. It is surprising that the silence of the Act on this point should be thought to open the door to proceedings before the Divisional Court to prevent the tribunal from entertaining such a reference for want of jurisdiction to do so. If it has jurisdiction in the one case, it would seem to have jurisdiction in the other. No doubt the tribunal must, as a semi-judicial body entrusted with the power to alter private rights, honestly address itself to the merits of each individual reference that comes before it. If, in the present case, the tribunal has said : ‘We order that the rents of these eight flats be reduced because it is our policy to reduce all rents in blocks of flats in which we have already ordered two reductions’, then its determination would, it is submitted, have been invalid. But such a principle cannot be applied to the local authority, because the role assigned to it in the scheme of the Act is fundamentally different. It has no power to give a conclusive decision; its function is merely to set the machinery in motion. In all the English cases known to the present writer where acts of public authorities have been held to be *ultra vires* on the grounds that statutory powers have been exercised for improper purposes, the effect of those acts has been to operate directly upon private rights.

There remains the question whether the landlords were denied a hearing according to law. In citing *Board of Education v. Rice* [1911] A.C. 179, Lord Goddard C.J. had in mind Lord Loreburn’s much-quoted dicta (at p. 182), that bodies acting judicially ‘must act in good faith and fairly listen to both sides . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view’. These principles were violated in *R. v. Kingston-on-Hull Rent Tribunal, Ex p. Black* [1949] 1 All E.R. 260, where, as a result of a strange misunderstanding, the tribunal reduced the rent without permitting the landlady to give evidence as to its reasonableness. In the present case, however, the matter complained of was altogether dissimilar. The members of the tribunal made a personal inspection which left them with the impression that the flats did not conform to modern standards. Their impression may have been erroneous; but it is not for the courts to correct such an error. They conveyed their impression to the landlords’ employees, but not to the landlords themselves. That it would

have been helpful to the landlords to have been told of the tribunal's views may readily be admitted; just as it would be helpful to all landlords and tenants appearing before rent tribunals to be told of all impressions formed by members of the tribunals, both during the inspection and at the hearing, which might be prejudicial to their cases and to which they could supply convincing answers. But rent tribunals, like arbitrators and, for that matter, judges, are under no legal duty to communicate such impressions to the parties. It is difficult, therefore, to see why in the present case the landlords were held to have been denied a hearing. One result of the case may well be to discourage tribunals from giving reasons for their decisions.

S. A. DE SMITH.

COURTS MARTIAL

THE limited control by civil courts over courts martial is illustrated by two recent cases, *R. v. Secretary of State for War, Ex p. Martyn* [1949] 1 All E.R. 242 and *R. v. O./C. Depot Battalion R.A.S.C., Ex p. Elliott* [1949] 1 All E.R. 373. The former was an application for certiorari to quash a decision of a court martial finding the applicant a deserter on the grounds that the Rules of Procedure had not been observed in convening the court. The Rules provided in the particular case for convening a court 'forth-with' but the court was not in fact convened for over a month. The jurisdiction of the court martial could not be disputed and the Divisional Court held the non-observance of the Rules of Procedure to be a matter solely for the military authorities as one of military law and so beyond the purview of the civil courts which could only interfere so far as the civil rights of the soldier were affected. In *Elliott's Case*, Lord Goddard re-affirmed this principle where there was an application for habeas corpus. In determining whether or not there had been an excessive delay amounting to oppression which would entitle the court to interfere by ordering a release on bail, he held the Rules material in assisting the court to reach a conclusion, but again emphasised that disobedience to the rules would not of itself entitle the applicant to a release under habeas corpus, provided he was subject to military law.

Two further points were made in the second case. The legality of an arrest in Belgium had been argued on behalf of the applicant, but was held to be irrelevant in these proceedings whatever might be his position as against those who had executed the arrest. Following *Ex p. Scott* (1829) 9 B. & C. 446, the Lord Chief Justice held that once a prisoner is in lawful custody in this country the court had on such an application no power to go into the circumstances in which he was brought here. Finally he held that s. 154 of the Army Act, requiring suspected deserters to be brought before a court of summary jurisdiction, was intended to give in relation

to the arrest of suspected deserters the same protection as is given to the police in the case of arrest of suspected felons. Its provisions were therefore inapplicable to the arrest of persons such as the applicant who were subject to military law and whose arrest was therefore justified under s. 45 of the Act.

J. D. B. MITCHELL.

MONEY PAID UNDER MISTAKE

ALTHOUGH *Larner v. London County Council* [1949] 1 All E.R. 964, does not contain any new principles on the recovery of money paid under a mistake, it does give useful emphasis to recognised principles. The facts were simple; the plaintiff, an employee of the London County Council, after he was called up for service in the R.A.F., had had the difference between his service and his civil pay made up by the London County Council under a resolution of the council adopting the powers of the Local Government Staffs (War Service) Act, 1939. The resolution provided for employees notifying all changes in service pay, a requirement which was brought to the plaintiff's notice by the claim form which he signed even if he were ignorant of the terms of the resolution. As a result of his failure to report such changes he was overpaid by the London County Council, who on his return to their service attempted to recoup themselves by deductions from his wages. These deductions he now sought to recover, the London County Council counter-claiming for the balance of the overpayments, and the argument turned therefore on their ability to recover these sums.

The amounts were not disputed nor was it denied that the overpayments resulted from a mistake of fact, but they were alleged to be irrecoverable because they were voluntary, and because the recipient had changed his position for the worse. On the first point Denning L.J. delivering the judgment of the Court of Appeal emphasised the limitation placed by *Morgan v. Ashcroft* [1938] 1 K.B. 49, on the supposed doctrine expressed by Bramwell B. in *Aiken v. Short* (1856) 1 H. & N. 210, at p. 215, that the mistake 'must be as to a fact which, if true, would make the person paying liable to pay the money'. The nature of the payments now in dispute was ambiguous. It had earlier been discussed in *National Association of Local Government Officers v. Bolton Corporation* [1943] A.C. 166, where the point in issue was the jurisdiction of the National Arbitral Tribunal to deal with a refusal by a local authority to adopt the Act. The House of Lords though unanimous in the conclusion that the payments if made were not purely gratuitous was not at one as to their precise character; Lord Wright (at p. 187) referred to them as not 'a mere gratuity' but added that there was an element of bounty granted for reasons of national policy, whereas Lord Porter (at p. 196) referred to them as received 'as of right'.

Lord Simon (at p. 178) referred to a promise to make them as enforceable 'if made for good consideration'. They appeared to be payments made with statutory authority under obligations imposed by public policy and by the conduct of a good employer, and as something of a hybrid falling between purely voluntary payments and payments legally enforceable. This difficulty of classification illustrates the difficulties of applying contractual formulae to nationally negotiated service agreements, but in the present case Denning L.J. (pp. 966-7) regarded their enforceability as immaterial; it was enough that proper payments were regarded as in some sense 'due' under a promise. Since the supposed duty of payment was based on a mistake of fact induced by the plaintiff and in truth did not exist, it followed that there was a sufficient difference to enable recovery. It would seem that the same conclusion could have been reached without the concept of 'duty', since even if gratuitous the payments believed to have been made were authorised by statute whereas those in fact made were not and would have raised a liability to surcharge, a factor which must have been a fundamental difference within the reasoning of Scott L.J. in *Morgan v. Ashcroft* at p. 74.

On the second point of estoppel based on the alteration of circumstance, Denning L.J. makes it clear that simply spending the money will not alone prevent recovery from the recipient unless there has also been some neglect or breach of duty or misconduct on the part of the payer as in *Holt v. Markham* [1923] A.C. 166, where the paymaster had lulled the recipient into a belief that the sums paid were rightfully his. That case was distinguishable too, in that here the essential facts were not available to the paymaster (though had they been, recovery would not necessarily be barred: *Weld-Blundell v. Synott* [1940] 2 K.B. at p. 116), but rather were in the knowledge of the recipient and were not disclosed by him. Clearly his knowledge and his breach of duty prevented him raising successfully a plea of estoppel, and in the view of the court such a plea is excluded alike by an innocent misrepresentation as by a breach of duty on the part of the person seeking the benefit of it. Certainly in the present case any other result would have been strange; it is in any event perhaps difficult to regard the simple spending of new-found wealth as an alteration of one's position for the worse unless it has resulted in continuing liabilities.

J. D. B. MITCHELL.

SALE OF GOODS—RIGHT OF REJECTION

THE case of *Ruben, Ltd. v. Faire Bros.* [1949] 1 K.B. 254 raises a short but not uninteresting point. Rubber material was sold by sample and under the description of 'Linatex in 41 ft. rolls, 5 ft. wide'. The buyers sub-sold half the material and at

their request the sellers dispatched it direct to their customer. The latter rejected it on the ground that it was not in accordance with the sample, and did not agree with the description since the rolls were not 41 ft. in length or 5 ft. wide. The question for decision was whether the original buyers were also entitled to reject.

If, as the Judge held, the goods were not in accordance with the description and sample then there had been a breach of the conditions implied by Sale of Goods Act, 1893, ss. 13 and 15, but the buyers had lost their right of rejection if they had 'accepted' the goods (s. 11 (1) (c)). S. 35 defines acceptance as follows:— 'The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller . . .'. The well-known case of *Hardy v. Hillerns* [1923] 2 K.B. 490 holds that onward delivery to a sub-purchaser is an 'act inconsistent with the ownership of the seller', but the same case stresses that effect must be given to all the words of the section so that the buyer will not lose his right of rejection unless that act follows delivery to him. The learned Judge held that in the present case there had been constructive delivery to the buyers when the goods were set aside at the seller's works and held to the order of the buyers. Hence they had lost their right to reject and were limited to a claim for damages.

The case emphasises the danger to a wholesaler of indulging in the common practice of sending on to a retailer goods supplied by a manufacturer without prior inspection. On the other hand it cannot be said that the exact circumstances in which he will lose his right to reject are even now entirely clear.

In the first place, there seems to be some uncertainty as to the meaning of 'delivery to him' in s. 35. One would have thought that 'delivery' must be used in the same sense as elsewhere in the Act and that s. 32 (1) applied so that delivery to a carrier would *prima facie* be sufficient delivery to the buyer. On this view, in *Hardy v. Hillerns* (*supra*) delivery to the buyer took place at the latest when the shipping documents were transferred. But this does not seem to have been the view of the court in that case; both the Court of Appeal and Greer J. in the court below¹ appear to have accepted the finding of the arbitrator that delivery took place when the goods themselves were handed over on arrival of the ship. Greer J. appears, indeed, to have based his judgment on the fact that there had been delivery *to the place where it was contemplated that examination should take place* and the earlier decision in *Molling v. Dean* (1901) 18 T.L.R. 217 seems to be an authority for this view. This point does not appear to have been considered in

¹ [1923] 1 K.B. 658.

Ruben v. Faire; might it not have been argued that in the circumstances the parties had impliedly agreed that the sub-purchaser's address was the place for examination?

Secondly, there seems to be some slight obscurity as to what acts will be deemed to be 'inconsistent with the ownership of the seller'. In both *Hardy v. Hillerns* and *Ruben v. Faire* the act was the onward delivery of the goods themselves to a sub-purchaser, and the judgment of Greer J. implies that nothing less than the physical movement of the goods will suffice. He pointed out that under s. 36 the buyer who rejects is not bound to return the goods to the seller but the seller has to collect. He said, at p. 644: 'If the buyer was entitled to reject them when they had been sent 100 miles, or it may be 500 miles, away from the place where they were delivered, it would, in my judgment, be for the seller to take the goods back to the place of delivery. I think that supports the view that if the buyer for his own purposes sends the goods away from the place of delivery, it is not likely that the statute would put upon the seller the obligation of bringing them back to the place where he had sent them'. Similarly, Bankes L.J. said in the Court of Appeal ([1927] 2 K.B. at p. 496): 'Where under a contract of sale goods are delivered to the buyer which are not in accordance with the contract, so that the buyer has a right to reject them, the seller upon receipt of notice of rejection is entitled to have the goods placed at his disposal so as to allow of his resuming possession forthwith, and if the buyer has done any act which prevents him from so resuming possession that act is necessarily inconsistent with his right'. It would therefore appear that the mere sub-sale, even though accompanied by transfer of the documents of title, will not take away the buyer's right of rejection; there must be a dealing with the goods themselves and perhaps, as we have seen, this must take place not merely after delivery to the buyer in the normal sense but after delivery to the place contemplated for examination.

Finally, it should be pointed out that in both *Hardy v. Hillerns* and *Ruben v. Faire* the goods did not correspond with the description. Might it not therefore have been argued that in neither case had 'the goods' ever been delivered or *a fortiori* accepted?² No doubt this point was not taken because in both cases the goods actually delivered did approximate to the goods contracted to be sold; it may not have been Santa Fe wheat but it was wheat, it may not have been rubber in 41 ft. rolls but it was rubber. But

² These points are considered in an interesting article in 15 Can. Bar Review, p. 760, by Prof. Montrose. His argument is that the courts impliedly draw a distinction between basic definition and supplementary description and that no clause in the contract excluding warranties and conditions can force the buyer to take goods other than those defined (see, e.g., *Andrews v. Singer* [1934] 1 K.B. 17). He suggests that similar arguments should apply to s. 35 unless 'the goods' referred to in that section means the goods actually delivered and not the goods contracted to be sold.

supposing the seller contracts to sell wheat and delivers sacks containing sawdust? Can it be said that there has been a delivery and acceptance if the buyer believing the sacks to contain wheat forwards them to a sub-purchaser of wheat?

L. C. B. GOWER.

SALE OF GOODS IN MARKET OVERT

THE recent case of *Bishopsgate Motor Finance Corporation v. Transport Brakes* [1949] 1 K.B. 322 is a reminder of the extent to which our modern commercial law is dependent on relics of an earlier age, a fact which no doubt delights the academic lawyer but for which the business world displays less enthusiasm. The question in the case was whether a car had been sold in a lawfully constituted market (Maidstone) in accordance with the custom of the market. If so the buyer obtained a good title although his seller had none (Sale of Goods Act, 1893, s. 22 (1)). The Court of Appeal (affirming the decision of Humphreys J.) held that it had. In so doing they decided:—

1. That a market could be lawfully established by statute as well as charter.

2. That provided the goods were exposed for sale in the market and sold there in the daytime it did not matter whether they were sold by the owner or by an auctioneer who normally traded in the market.

3. That provided the custom of the market extended to sales by private treaty such a sale was as effective as a sale by auction.

In arriving at a decision on these points they considered a series of cases extending in time back to the 16th century and in space to Australia, and some very pretty learning was displayed. We leave the more historically minded Reviews to add a gloss to this learning; our purpose here is to question whether in the 20th century there is room for these anachronisms. When originally introduced into the common law a rule which protected a purchaser of wool in the mediæval fairs and markets was obviously a very reasonable one, but the justification for giving a purchaser of a car in Maidstone market (or any open shop in the City of London) a protection denied to a purchaser of a similar car in Portland Street is less obvious. Nor is this the only nonsensical rule which pervades this branch of the law; it is even more absurd that the protection of the purchaser should depend on whether his predecessor in title obtained the goods by larceny by a trick or by fraud, thus perpetuating in commercial law a distinction which is no longer of practical importance in criminal law. Perhaps some private member who is lucky in the ballot might introduce a Sale of Goods (Amendment) Bill? If so we look forward to an interesting debate between the apostles of practical convenience,

and the upholders of our legal traditions, briefed no doubt by the Society of Public Teachers of Law campaigning in defence of their vested interests in markets overt, *Phillips v. Brooks*, *Lake v. Simmons*, etc.

Finally it is worthy of note that the Court of Appeal approved the decision of Croom-Johnson J. in *Joblin v. Watkins & Roseveare* (briefly reported in [1949] 1 All E.R. 47) that a car registration book is not a document of title within the meaning of the Factors Act, 1889. The judgment of Denning L.J. contains some interesting observations on this point and he suggests that if a car owner retains control of his log book a purchaser is unlikely to obtain a good title as any forgery will probably be so obvious as to put him on inquiry. In this connection, however, our experience is that car dealers never regard the mere absence of the original log book as the slightest obstacle in the way of disposing of the car and our impression is that it is easier than it ought to be to obtain a duplicate. Presumably the mere fact that the seller produces such a duplicate is not enough to put a buyer on inquiry?

L. C. B. GOWER.

AFFREIGHTMENT—UNSEAWORTHINESS—CAUSATION

In the very important case of *Monarch Steamship Co. v. A/B Karlshamns Oljefabriker* [1949] 1 All E.R. 1, the facts were that, on April 4, 1939, a Japanese company in pursuance of a time charter directed a British steamship belonging to the appellants to proceed to Rashin in Korea, to carry a cargo of soya beans to whatever port of discharge the charterers might opt within a range of North Sea and Baltic ports. When she left Rashin on May 12, the ship was unseaworthy, and, as a result, was detained for repairs at Aden and Port Said until September 23. On June 7, the charterers had nominated Kronshamn which the vessel ought to have reached before the end of July. Instead, on the outbreak of war, she was ordered by the British Admiralty to proceed to the port of Glasgow, where she arrived October 21.

Concurrently with these events, the Japanese charterers had, on April 21, sold the beans to the Swedish respondents, and, on October 23, duly transferred to the respondents the bills of lading. The purchasers chartered three small neutral vessels to tranship the beans to Kronshamn. It was these transhipment costs of something over £21,000 which the Swedish purchasers were claiming from the shipowners, alleging that this pecuniary loss was suffered as a result of the initial unseaworthiness of the ship.

The legal statements evoked in the House of Lords by the central issue of causation are of the utmost importance to the law of affreightment. But, in the interests of a complete version of the

case, it is convenient to deal beforehand with certain interesting subsidiary points of law that emerge from the judgments.

- (1) Lord Porter stated: 'Undoubtedly, deviation necessarily made to remedy unseaworthiness does not amount to unjustifiable deviation or destroy the right to rely on the terms of the contract of carriage unless it is established that the owners knew of the vessel's state on sailing' (at 5). On the question of law, *The Europa* [1908] P. 84, and *Kish v. Taylor* [1912] A. C. 604, were cited in support. On the question of fact, Lord Porter considered that no such knowledge existed on the part of the shipowners. Dealing with the latter first, it is interesting to note that Lord Wright held to the contrary, that 'the appellant was fully aware of the risk connected with the boilers' (at p. 11). Secondly, and more important, the legal point made was a startling one. In *The Europa*, it is true, the shipowners did not know of the unseaworthiness; on the other hand, in *Kish v. Taylor*, they did. In neither case, however, was any legal significance attached to this fact. If it were, then the sound doctrine laid down in those two cases would be partially abrogated for known unseaworthiness causing deviation would, in effect, operate as a breach of condition precedent. Neither authorities nor principle support what must be considered mere dictum. Quite the reverse, an action for damages will lie if a master, after notice of the unseaworthy state of his ship, continues the voyage to the destruction or loss of the cargo; not, if he deviates to a port of repairs. Knowledge, actual or imputed, on the part of the shipowners is immaterial in this respect.
- (2) Lord Porter remarked: '. . . the respondent was entitled to recover the expenses of forwarding the goods in fulfilment of his contract whether the contract was contained in the charterparty or in the bills of lading, and, under the Bills of Lading Act, 1855, could transfer that right to the assignee of the latter documents' (at 9). Insofar as the assignment of charterparty rights under the 1855 Act is concerned, Lord Porter's statement is, with great respect, manifestly loose. It is only the rights and liabilities 'contained in the bill of lading' that fall within the purview of section 1 of the Act. Thus, if an inconsistency occurs between the charterparty and bill of lading terms, the assignee is entitled to rely implicitly on his bill of lading.
- (3) Lord Porter denied the assertion that damages for mere delay in delivery are not awarded in carriage of goods by sea. The true rule was that the voyage must be performed with reasonable dispatch. In the days of sail, 'reasonable dispatch' was an elastic requirement. Today, however,

with the high standards attained in mechanical efficiency, the phrase must be taken in the majority of cases to mean conformity with the time-schedule agreed upon between the parties.

- (4) Lord Wright dismissed the argument that the contract was frustrated on two grounds: namely, that the frustrating event (a) was caused by the act of the shipowners, and (b) was within the plain contemplation of the parties in that it was expressly provided for in the War Risks Clause.

Turning, now, to the main issue in the case, it is vital to the reasonable foresight test of remoteness of damage that there should be determined precisely the data on which the reasonable man, or, here, the reasonable commercial man, is to base his foresight. In the law of contract the reasonable commercial man is limited to all data available at the time of breach. Where the data are of a normal character the reasonable foresight test takes the form of the 'direct and natural consequences' rule in *Hadley v. Baxendale* (1854) 9 Exch. 341. Where, however, additional data are to hand by reason of an express communication, or circumstances amounting to an implied communication, between the parties, then the reasonable foresight test takes the form of the 'special circumstances' rule in *Hadley v. Baxendale*. Whichever form it takes, it is the reasonable foresight principle which governs the problem of remoteness of damage in the general law of contract.¹

Breach of the warranty of seaworthiness is a breach of contract. Accordingly, on principle, the question of whether the unseaworthiness caused the particular loss should be decided by applying the reasonable foresight test, as was done in the instant case by Lords Porter, Uthwatt, and du Parcq. Thus, at the date of the charter-party the ship was unseaworthy. At this time business men engaged in international trade ought to have foreseen that war might break out and that, as a consequence, if the ship were delayed because of unseaworthiness, she might never reach her port of destination on account (*inter alia*) of restraint. Hence, the transshipment, from Glasgow to Kronshamn was not too remote a consequence of the unseaworthy state of the ship. The British Government had, it is true, offered a very favourable price for the beans in Glasgow, but in the circumstances, it was reasonable for the Swedish firm to prefer soya beans to sterling.

Lord Wright reached the same conclusion by applying a different and (it is submitted) conflicting test principle, *viz.*, that unseaworthiness will be deemed to have caused the eventual loss or damage

¹ It might be noted that the actual assessment in terms of money of the damages arising from the not-too-remote damage is not strictly a matter of law but one of accountancy.

provided the loss or damage would not have occurred but for the unseaworthiness. If a ship sailed in an unseaworthy condition because it lacked an adequate medicine chest, and foundered in a storm, the loss would not be due to the unseaworthiness of the ship, there being no relevance between them. But, provided relevance exists between the unseaworthiness and the loss or damage, the test principle operates literally. This principle is supported by the decision of a very strong Court of Appeal in *The Christel Vinnen* [1924] P. 208, by obiter dicta² of Lord Wright (in which Lord Atkin concurred) in *Smith, Hogg & Co., Ltd. v. Black Sea and Baltic General Insurance Co., Ltd.*, and by the opinions of the leading textbook writers.³

That the 'Wright test' does conflict with the 'Porter test' may be demonstrated by reference to the following pair of situations :—

- (1) where a ship is delayed by unseaworthiness and then founders (or the cargo is damaged) in a storm which it would not have encountered but for the unseaworthiness, the unseaworthiness will be deemed to have caused the loss if the 'Wright test' be applied,⁴ but will not be considered the cause if the 'Porter test' is applied⁵; and,
- (2) where a ship is lost (or the cargo is damaged) by reason of the negligence of its master, but the cargo would have remained unscathed by the master's negligence but for the unseaworthy state of the ship, here again, the 'Wright test' would yield a positive⁶ and the 'Porter test' a negative result, since, in the latter case, the novus actus, unlike the throwing of the stone by the mischievous boy in *Haynes v. Harwood* [1935] 1 K. B. 146, could not be considered as reasonably foreseeable.⁷

Which principle, then, governs the law of remoteness in relation to unseaworthiness in a contract of affreightment? As a result of the case under review, *The Christel Vinnen* must (it is submitted) be regarded as implicitly overruled, and the reasonable foresight test established as the governing principle by the majority of the House of Lords in what henceforth deserves to be considered as the leading case on this part of the law.

C. GRUNFELD.

² See Scrutton, *Charterparties* (15th ed.), at 103, n. (b).

³ Carver, *Carriage by Sea* (8th ed.), Sec. 17; cf. also the wording adopted in Scrutton, *ibid.*, at 97, and MacLachlan, *Merchant Shipping* (7th ed.), at 294, 331.

⁴ *Smith, Hogg & Co. v. Black Sea & Baltic General Insurance* [1940] A.C., at 1005, 1007 (per Lord Wright).

⁵ Instant case, at 7 (per Lord Porter).

⁶ *Smith, Hogg & Co., ibid.*, at 1003, 1005, 1007 (per Lord Wright).

⁷ *Smith, Hogg & Co., ibid.*, at 1002, 1003 (the doubts expressed by du Parcq L.J. in the court below). It is further noteworthy that in *Smith, Hogg & Co.*, Lord Porter decided the case on the footing that the master of the ship was not negligent.

LAW OF THE ROAD

THE relationship between pedestrians and motorists is pre-eminently one that falls within the terms and meaning of Lord Atkin's 'neighbour' dictum in *Donoghue v. Stevenson* [1932] A.C. 562, at p. 580. But the common law duty of care, which is satisfied by driving at a reasonable speed and keeping a proper look-out, has proved too loose-knit and inadequate as vehicular traffic has grown more numerous and speedy whilst city roads have grown relatively more archaic. Until the creation of motorways suited to a 'megapolitan' civilisation, a tighter control of traffic has become necessary to preserve human lives. Pedestrian-crossings and the regulations relating thereto form an essential part of the apparatus of this control; and reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, forms the subject-matter of the House of Lords decision in *L.P.T.B. v. Upson* [1949] A.C. 155. The regulation is couched in the following terms :

'The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able, if necessary, to stop before reaching such crossing.'

Read in conjunction with regs. 4 and 5, reg. 3, the House of Lords held, governed the conduct of traffic at both uncontrolled and controlled crossings, and at the latter even if traffic-lights favoured the driver. What, precisely, then, should a driver do when approaching one of the hundreds of pedestrian crossings in, say, the London area?

Literally, reg. 3 means that vehicles would have to come to a dead stop at every pedestrian crossing. 'Such a construction would make nonsense of the regulation' (*per* Lord Porter, at 164). Accordingly, reg. 3 must receive a rational interpretation in the context of regs. 4 and 5. Now, a vehicle does not cease to 'approach' a crossing until it actually reaches it. The crucial words of reg. 3 for the driver are : 'unless he can see that there is no foot passenger thereon'. That is to say, if the driver can see no-one on the crossing, he can go ahead and accelerate. But, at what precise distance from a crossing may a driver content himself that no pedestrian is on it? Reg. 3 itself does not say. The House of Lords, therefore, to give reg. 3 meaning, attempted to read in a distance.

- (1) Lord Porter held that it should be 'a reasonable distance' (at 164); and a reasonable distance amounts to this, 'that the motorist must be able to see whether the crossing is clear or not up to the time when, going at the speed he is going, provided it is a reasonable speed, he would still be able to stop before reaching the crossing' (at 165). With great respect, this definition is far too imprecise. What is a

‘reasonable speed’ in this connection where, in a built-up area, the motorist may legally range from 1 to 30 m.p.h.? Until the reasonable speed is decided upon, the reasonable distance remains indefinite.

- (2) Lord Wright held that ‘the point of time or place at which the duty to regulate the speed attaches . . . must be left to the judgment of the court, which has to decide what a reasonable driver would do in the particular facts of the case’. Lord Wright did ‘find valuable guidance’ in the fifteen feet to twenty feet zone specified by du Parcq L.J. in *Chisholm v. L.P.T.B.* [1939] 1 K.B. 426, at p. 449 (at 170). The observations of du Parcq L.J. in *Chisholm’s Case*, however, did not commend themselves to Lord Porter (at 165).
- (3) Lord Uthwatt held that once the vehicle is an ‘approaching vehicle’ (which his Lordship defined) then, if the driver is unable to see that there is no passenger on the crossing, ‘he has, subject only to the application of the principle, *lex non cogit ad impossibilia*, broken the regulation if the speed of his vehicle is not at that time such as to enable him, if necessary, to stop before reaching the crossing. . . . Undoubtedly, . . . cases might well occur where, consistently with reading the regulation as directed to regulating the movement of traffic and not to stopping traffic (as, I think, it ought to be so read), it is impossible in any rational sense to comply with it. In such cases, the principle as to impossibility . . . takes the matter outside the purview of the regulation’ (at 173).
- (4) Lord du Parcq and Lord Morton agreed with the judgment of Lord du Parcq when sitting as Lord Justice in the *Chisholm Case*: viz., that the ‘reasonable distance’ is about fifteen to twenty feet from the crossing.

Clearly then, the driver is in something of a quandary and so too is the policeman who must keep an eye on the driver. The driver can never be quite certain, at any rate in a populous street, that no pedestrian will step off the pavement on to the crossing. Some pedestrians, again, are often in two minds, sometimes three or four minds, about crossing. What should the driver do, then? He may, of course, stop at every crossing.

If driving through a large town is not to be a hopelessly long drawn-out and nerve-wracking affair, the respective rights and duties of drivers and pedestrians must be more precisely specified than they are in the existing rules and, what is more, communicated clearly to all members of the public, pedestrians and motorists alike. As they stand at present, the regulations are, as Lord Porter put it, ‘ill-drafted and ill-considered’ and so impracticable that

pedestrian-crossings in London and the country over witness each week the commission of tens of thousands of technical motoring offences.¹

C. GRUNFELD.

RELIGION AND PUBLIC BENEFIT

THE Roman Catholic Church has established in England a number of priories whose inmates spend their lives in complete seclusion, devoting themselves to prayer and meditation and never performing any 'good works'; that is, never admitting the public to their religious services, and carrying out none of those acts of material benefit to the community at large, such as teaching, nursing and tending the poor, which the less strictly cloistered orders usually undertake. The practice has been to treat such institutions as non-charitable. In order to try to change this practice, a test case has been started and taken to the House of Lords. Their Lordships have held (*Gilmour v. Coats and Others* [1949] 1 All E.R. 848) that such an institution is not a charity, since there is no evidence that it confers any benefit on the public. They have thus confirmed the views of the Court of Appeal ([1948] Ch. 340; [1948] 2 All E.R. 521) and of the court of first instance ([1947] 2 All E.R. 422).

This note can do little more than give an outline of the reasons for the decision. Two distinct arguments were submitted by counsel in favour of the view that the convent of cloistered nuns was a charity. In the House of Lords a third argument was added. The first of these three arguments is that the nuns' activities are beneficial to the public, since, according to the teaching of the Church, the prayers of the nuns are efficacious in securing Grace from Heaven for the human race as a whole. It was proved by an affidavit of His Eminence Cardinal Griffin that this is the doctrine of the Roman Catholic Church. Counsel argued that the court does not inquire into the truth or otherwise of religious doctrine. But as the learned Master of the Rolls pointed out—and his view was approved by the Upper House—this simply means that once a religion is recognised by the court as a religion, a gift for its advancement is presumed to be beneficial; but it does not follow that it is presumed to be publicly beneficial. His Lordship went on :

'Save to the extent which I shall presently mention, no English authority has been quoted to us, and I know of none, in which the existence of a benefit of the necessary public character has, when

¹ In the *Times* newspaper of February 22, 1949, the Minister of Transport has been reported as announcing that the regulations are to be amended to give drivers 'precedence' over pedestrians at controlled crossings when the signals stand in the driver's favour. Drivers may, as a result, feel flattered but hardly safeguarded; for, as matter of detailed information, what exactly is meant by 'precedence'? On the other hand, the experimental warning lines of which the M. O. T. also spoke do represent a sound step in the direction of more precisely defined duties.

challenged, been shown to exist otherwise than by proof of works which have a demonstrable impact on the community or a section of it. I use the word "impact" for want of a better word as covering the benefits conferred by teaching and ministration, by the performance of religious services, by the provision and repair of churches and church ornaments and so on. I use the word "demonstrable" as meaning that the benefit must be capable of proof in a court of law'.

Lord Simonds expressed the same view in the following words: 'Here is something that is manifestly not susceptible of proof. . . . The faithful must embrace their faith believing where they cannot prove; the court can act only on proof.'

The second argument for the convent sought to find the necessary element of public benefit in the example of piety afforded to the public by the nuns. While not denying that edification may in some cases constitute the required element of public benefit, Lord Simonds described the edification afforded by the nuns' pious example as 'too vague and intangible to satisfy the prescribed test'. Lord Reid considered the benefit too remote.

This brings us then to the third argument, which had not been submitted in the lower courts; according to this argument, the community benefited is the whole class of women of the Roman Catholic faith, and the benefit consists in the opportunity afforded to any of them who desires to do so to apply for admission to the convent. A close analogy exists in educational endowments, where the benefit consists of the chance which a large part of the population enjoys of receiving certain education if they so desire. But Lord Simonds pointed out that an educational endowment would only be charitable if the fruits of the education accrued to the public; the true analogy would be with a gift for the advancement of education subject to a condition that the beneficiaries should lead cloistered lives and leave no record of the fruits of their study whatever; such a gift would not be charitable. This disposes of the argument. It was not, it is respectfully submitted, necessary to add the further point, as his Lordship did, that there may be different standards of public benefit used in respect of education and of religion. But the point leads to interesting speculation. Lastly, it is noteworthy that their Lordships were also led to decide as they did by an unwillingness to reverse the practice which has held since the decision in *Cocks v. Manners* (1871) L.R. 12 Eq. 574.

The decision is important. It confirms the dicta in *National Anti-Vivisection Society v. I. R. C.* [1948] A.C. 31, that public benefit is an indispensable requirement for any kind of charity. It also overrules dicta that the law will presume gifts for education, religion and the relief of poverty to be publicly beneficial until the contrary is shown. The burden is always on the party seeking to prove the benefit. It is worth noting, too, that all the judgments refrained from overruling *Re Caus* [1934] Ch. 162. Nor was

adverse comment made on the well-known line of decisions, which have been dubbed anomalous, in which gifts 'in private charity' for the relief of poverty were held charitable. Nor was any mention made of cases like *Re Wedgewood* [1915] 1 Ch. 113 (C.A.), in which it was laid down that the edification afforded to the public from the knowledge that animals were not suffering maltreatment constituted public benefit. Lord Simonds left the point open; his Lordship affirmed that the law had developed empirically, and that a divergence of treatment of the different categories of charity was justifiable. We are not therefore surprised to find, for example, a decision like that in *Re Moss* [1949] 1 All E.R. 495, in the same volume of reports as the present decision. But to a foreigner not accustomed to our methods it may appear a trifle inconsistent that we consider the edification derived from the example of piety to be vague and intangible, while we are substantially edified by the thought that animals are being put to sleep painlessly.

D. C. POTTER.

WHAT IS A TESTAMENTARY GIFT?

AN intricate point of practical importance has been decided by Romer J. in *Young v. Sealey* [1949] 1 All E.R. 92. But with the greatest respect to the learned judge, it is fair to say that the point cannot be considered as finally decided until an appellate court has pronounced upon it. The whole question of the construction of section 9 of the Wills Act, 1837, is in issue.

Miss Y. opened a joint banking account in the names of herself and her nephew. She went further and joined with her nephew in instructing the bank to pay away the fund to the order of either. Now whereas at law the nephew had power to withdraw money from the account without consulting his aunt, the position in equity in such a case would be that, since the aunt alone paid money into the account, we must look to the parties' intention to see if the nephew held his share of the fund on an implied trust for his aunt, or beneficially for himself. The aunt's intention was to evade death duties and the Wills Act, by controlling the account herself during her life, and allowing her nephew to take, by *jus accrescendi*, whatever was left in the account at her death. In the eyes of equity, therefore, the account was the sole property of the aunt during her life, with power to dispose of it as she pleased, while after her death any money she chose to leave in the account passed to the nephew.

The question should then arise, whether the whole transaction is void as an attempt to make a testamentary gift otherwise than in the form required by the Wills Act. Section 9 of the Wills Act does not specifically avoid gifts made inter vivos with a reservation to the donor of a life interest and a power to revoke. On the

other hand that enactment has been construed as permitting no kind of disposition intended to take effect on death and to be revocable until then, unless that disposition has been made in testamentary form. The question, on which side of the line the present case falls, was avoided by the learned judge, who found that the facts in the case were sufficiently similar to certain earlier decisions to allow him to decide in the nephew's favour without pronouncing on the underlying principles. Should any similar case ever come before a higher court in the future, those principles may be more clearly defined.

D. C. POTTER.

TRADE MARKS AND PASSING OFF

THE case of *Aktiebolaget Manus v. R. J. Fullwood Bland, Ltd.* (1949) 66 R.P.C. 71; [1949] Ch. 208; [1949] 2 All E.R. 205 (Court of Appeal) raises two interesting points concerning the effect of the war on the rights of foreign owners of British trade marks.

The plaintiffs manufacture milking machines bearing the *Manus* brand in Sweden. For many years before the war the defendants were their exclusive selling agents in England. After the outbreak of the war imports of Swedish milking machines into England became impossible. In June, 1940, the parties agreed that the defendants for the period until September, 1941, should make the machines in England and mark them with the *Manus* brand. The defendants continued to use the *Manus* brand on their machines beyond September, 1941. After the end of the war, in 1945, the plaintiffs demanded that the defendants should discontinue the use of the *Manus* brand on British-made milking machines and revert to the position of agents and importers from Sweden. Upon refusal by the defendants the plaintiffs issued a writ for infringement of their *Manus* trade mark and for passing off.

On the trade mark issue the defendants pleaded that the plaintiffs had lost their right to the mark owing to five years non-use and counterclaimed to have the mark taken off the register under section 26 (1) of the Trade Marks Act, 1938. Against this the plaintiffs relied on section 26 (3) of the Trade Marks Act which excuses non-use 'due to special circumstances in the trade and not to any intention not to use or to abandon the trade mark'. The plaintiffs proved that owing to export restrictions in Sweden, import restrictions in England and other measures by the belligerents, the import of Swedish milking machines into England during the war was impossible. The court held that these war-time restrictions and measures constituted 'special circumstances in the trade' in the sense of section 26 (3). This conclusion appears obvious on the wording of section 26 (3). The ruling of the Court of Appeal is, however, of importance, because of some obiter dicta in earlier decisions to the effect that the special circumstances must affect all

persons engaged in 'the trade' and not only a particular trader like the plaintiff.

The defence against the passing off claim raised a much more difficult point. The defendants maintained that by the time the writ was issued in 1946 the *Manus* mark had become distinctive of the goods of the defendants and were no longer, in the minds of the trade and the dairy industry, connected with the goods of the Swedish plaintiffs. The defendants maintained that in these circumstances no question of deceiving the public and passing off arose, and that the internal relations between the parties and the rights and wrongs of the defendants' conduct were irrelevant. The court found the evidence on this point to be inconclusive. Quite apart from the question of proof the court did, however, reject this argument outright. The Chancery Judge as well as all the Appeal Judges refused to allow the defendants to rely on their own wrongful acts so as to appropriate to themselves the rights and goodwill which had up to September, 1941, been the property of the plaintiffs. In other words, the court refused the plea by the defendants that their piracy had been so very successful.

Ordinarily in passing off cases the views of the public (the trade and the consumers) as to the origin of the goods prevailing on the date of the writ are decisive. It has now been held that in cases of piracy an earlier date may become decisive. This projection back may result in some confusion in the minds of the public but the court has considered the right of the owner of the trade mark or goodwill to be paramount.

The decision is fully reported in the *Reports of Patent Cases*. The *Law Reports* and the *All England Reports* deal only with the issue on the non-use of the trade mark during the war period and entirely omit the passing off issue. Obviously neither the *Law Reports* nor the *All England Reports* can devote much space to passing off cases, but it is a pity that they did not bring Lord Justice Evershed's judgment on this important point concerning the law of passing off.

PETER MEINHARDT.

SERVICE OUTSIDE THE JURISDICTION

ALTHOUGH the decision of the House of Lords in *The Brabo* [1949] 1 All E.R. 294 raises certain questions of constitutional law upon which others will probably wish and feel qualified to comment, it is primarily important for the interpretation of Order 11 of the Rules of Supreme Court relating to the service of process upon a defendant outside the jurisdiction. The plaintiffs brought an action against a Belgian company, the Ministry of Supply and the British Iron and Steel Corporation, Ltd., and applied for leave to serve the first defendants on the ground (Order 11, r. 1, sub-paragraph (g)) that they were a 'proper party to an action properly brought

against some other party duly served within the jurisdiction'. The first defendants argued that, their co-defendants being agents of the Crown entitled to plead its privileges and immunities, the action against them was bound to fail and, consequently, was not 'properly brought'. Thus, the fundamental question arose whether and to what extent, at the hearing of an application for leave to serve outside the jurisdiction or to set aside such leave after it has been granted, it is open to the court to have regard to the probable success or failure of the action against the defendants within the jurisdiction. Indeed, this is a problem in no way confined to sub-paragraph (g), but arising in all other cases of Order 11, r. 1, and the decision of the House of Lords is therefore an authority on the general question of making leave to serve outside the jurisdiction dependent on the chances of the action. The decision establishes two propositions: First, in the words of Lord Porter (at pp. 298, 299), 'serious disputes of fact cannot as a rule be decided on a summons', though this may be different, 'where all the facts necessary for a decision are set out by one side or the other and not contradicted'. Secondly, where it is apparent that the action cannot succeed in law, leave to serve the foreign defendant must be refused, either because in that event the action is not 'properly brought' (this was the reason preferred by Lords Simonds, du Parc and Normand) or because the court would not be justified in exercising its discretion in favour of the plaintiff (this was the reasoning of Lords Porter and MacDermott).

In the present case the House took the view that as a matter of law the action against the English defendants would plainly fail. Where this conclusion is inevitably to be drawn from the plaintiff's own case, it would indeed be regrettable, if a foreigner, not normally subject to English jurisdiction, were prevented from arguing the point of law at the earliest possible stage, but were forced to submit to jurisdiction merely in order to raise almost at once the same point of law by asking the court under Order 25, r. 4, to strike out the statement of claim as disclosing no cause of action. The House of Lords has, however, gone considerably further and in effect held that leave should be refused where it appears not only that in law the plaintiff has no cause of action, but also that the English defendants, in the case of sub-paragraph (g), have a valid defence. Lords Porter and du Parc (at pp. 300, 309), it is true, thought that, not being bound by the statutes in question, the Crown was not indebted to the plaintiffs and that therefore no question of waiving the defence of immunity arose. But Lord Simonds said in terms (p. 304) that for the purpose of an application under Order 11, r. 1, sub-paragraph (g), it must be assumed that the English defendant will avail himself of all defences open to him; Lord Normand spoke to the same effect (p. 310) and Lord MacDermott reached the conclusion that 'in law and, assuming the defence of immunity to be taken, the plaintiffs would not succeed'

(p. 311). This is a remarkable extension which at first sight cannot easily be reconciled with the words 'properly brought' so strongly emphasised by Lord MacDermott. Perhaps its general significance, extending beyond the peculiar facts of the present case, should not be overrated. It is difficult to appreciate the necessity for or justice of allowing a foreign defendant to allege that his co-defendants can plead the Limitation Act, 1939, or the Statute of Frauds, or the Gaming Acts, if in fact they do not do so. There is nothing in the Rules which would compel or entitle the court to assume that defences, particularly if they are unmeritorious, will not be waived, nor is it possible in proceedings between the plaintiff and the foreign defendant to ascertain whether on the facts such waiver has not occurred.

The second proposition established by the present decision and referred to above is a purely negative one which can only rarely come into play. In so far as the much more frequent border-line cases are concerned, it remains true that, for the purpose of an application under Order 11, r. 1, 'it is enough if the court is satisfied that there is a real issue . . . which the plaintiff may reasonably ask the court to try'. This dictum of Morton J. (as he then was) in *Ellinger v. Guinness Mahon & Co.* [1939] 4 All E.R. 16, 22, was expressly approved by Lords du Parc and MacDermott (pp. 307, 310) and will continue to serve as a useful guide. It is submitted that the reality of the issue is missing only where the law is definitely settled by the clear words of a statute or a decision of the House of Lords, but that decisions of judges of first instance or of the Court of Appeal can only in exceptional cases be said to make the law so plain that a plaintiff should not be allowed to proceed against a foreign defendant.

F. A. MANN.

NULLITY—ARTIFICIAL INSEMINATION

R. E. L. v. E. L. [1949] P. 211, as the first reported case on artificial insemination, aroused considerable public interest, but it involved no new law and from the legal viewpoint is interesting mainly as an example of the application of well-established principles to novel facts.

The parties were married in 1942 and the marriage was never consummated owing to the husband's psychological incapacity. The wife was anxious to bear a child, particularly as she hoped that it would help the husband to overcome his inhibitions, and in December, 1947, she was artificially inseminated from her husband's seed. In January, 1948, she left him but subsequently discovered that she was pregnant as a result of the artificial insemination. In the following September she gave birth to a child who was, of course, legitimate. She then petitioned for nullity on the ground

of the husband's impotence or wilful refusal to consummate and was granted a decree on the former ground. The inevitable result was to bastardise the child.

It was this latter fact that rightly aroused public indignation. But the result was inevitable and there have been previous cases where the hardship to the child has been even greater (*e.g.*, *Dredge v. D.* [1947] 1 All E.R. 29, in which the child was bastardised after having been legitimate for seventeen years). The learned judge (Pearce J.) was much concerned as to whether this unfortunate consequence ought to induce him to refuse a decree, but he took the view (with which we respectfully agree) that the balance of advantage was in favour of granting one since there was no prospect of happiness for any of the parties while the marriage remained in existence, whereas if it was annulled the wife, and perhaps even the husband, might remarry and enjoy normal married happiness. Nevertheless, it seems monstrous that this result can only be achieved by bastardising the child. Pearce J. suggested that 'the stigmas of birth are of less effect than they were, and sons are not now judged by the errors of their parents'. Is this in fact true? If so, why was it thought necessary to introduce the new abbreviated form of birth certificate?

Surely the time has now come when incapacity and wilful refusal should be made grounds for divorce and not nullity? It was always illogical to make wilful refusal a ground for avoiding the marriage, since, unlike all the other grounds, it depends on subsequent conduct and not on circumstances existing at the time of the marriage. No doubt the object was to avoid the three-year bar, but this could be achieved by express provision. In any case it is doubtful whether this bar fulfils any useful purpose although it is perhaps too early to express a final opinion on this as it has hardly had a fair trial owing to the war. These logical objections do not apply to incapacity but the social objections are equally strong as it is now apparent that children may be born as a result either of fecundation *ab extra* or artificial insemination. The alternative to making both grounds for divorce would be to provide expressly that children shall remain legitimate,¹ as is done in the case of the other grounds for nullity introduced by M.C.A. 1937, s. 7. But this would be far less satisfactory as it would not avoid the absurdities revealed by *Re Dewhirst* [1948] 1 All E.R. 147, in which a widow who had remarried, but whose second marriage had been annulled, was held to be still entitled to her interest during widowhood under her first husband's will. The result of this decision is that personal representatives are not safe in distributing an estate on the remarriage of a widow but must wait until they are satisfied that the marriage has been consummated!

¹ This was the solution suggested by Lord Reading in the Debate referred to below but there was general agreement that the problem required consideration on a broader basis.

Perhaps the most interesting part of the judgment in *L. v. L.* was that concerned with the husband's argument that the wife should not be granted a decree because of want of sincerity on her part. This plea of want of sincerity has been frequently raised in recent nullity cases² but with a conspicuous lack of success and exactly what has to be shown to establish the bar is still somewhat obscure. Pearce J. quoted the dictum of Selborne L.C. in *G. v. M.* (10 A.C. 186), which bases it on what he described as a species of estoppel, and other expressions which have been used are acquiescence, laches and approbation, none of which makes the matter much clearer. The examples quoted by Lord Selborne seem to ignore one element of normal estoppel, that the other party shall have altered his position to his detriment, and as Pearce J. pointed out he had not altered his position in the present case. Nor had there been any acquiescence or want of sincerity in the ordinary sense; the wife had always objected to the abnormal marriage, had tried to bring about a normal relationship and when she failed had brought proceedings. The most difficult question was whether the deliberate conception of the child amounted to an approbation and the learned judge held that it did not as it was not done with the intention of approbating an abnormal marriage. The confused state of this branch of the law seems to flow from the basic failure of English law to decide whether matrimonial relief should be granted on principles of public policy or depend on the private wrong committed by one party on the other. In nullity (as opposed to divorce) the former principle is dominant, so that, for example, the impotent husband can petition (*Harthan v. Harthan* [1949] P. 115). But if this is so, it is difficult to see why private law principles of estoppel should be introduced; the parties cannot estop the court and if it is in the public interest to annul the marriage and grounds for doing so exist the rights and wrongs of the parties *inter se* should be irrelevant.

The problems arising out of the growing practice of artificial insemination have already been widely canvassed, notably in a most interesting and enlightened Report³ of an unofficial Commission appointed by the Archbishop of Canterbury in 1945, and in a Debate in the House of Lords initiated by Lords Reading and Brabazon on March 16, 1949.⁴ It need hardly be stressed that these problems greatly transcend the purely legal ones and for a consideration of the theological, psychological, sociological and eugenic implications, readers are referred to the Report and Debate mentioned above. These also deal with some of the legal aspects and there is no doubt that the courts will in future be faced with

² See, e.g., *Cowen v. Cowen* [1946] P. 36, *J. v. J.* [1947] P. 158 and *Baxter v. Baxter* [1948] A.C. 274.

³ S.P.C.K. 1948. Price 2s. 6d.

⁴ Hansard, Vol. 161, cols. 385-429.

problems far more difficult than those which arose in *L. v. L.* If the wife is inseminated by the seed of a donor other than her husband (A.I.D.) or the husband allows his seed to be used for the artificial insemination of another woman, is this adultery? The legal members of the Archbishop's Commission (Vaisey J. and Mr. H. U. Willink K.C.) thought it was,⁵ but it is submitted that this is clearly wrong. On the other hand, it is suggested that if this were done without the consent of the other spouse it might well be cruelty. Or again, can the woman obtain an affiliation order against the donor? Theoretically the answer seems to be yes, but as the medical practice is to keep secret the name of the donor the practical difficulties seem insuperable.⁶ The status of a child resulting from A.I.D. seems clear; if born during wedlock he would be presumed legitimate but would become illegitimate if the marriage was *annulled* or if the husband could disprove paternity.⁷ The most serious legal problem of all is, of course, the possibility that the practice of A.I.D. may lead to the inadvertent celebration of incestuous marriages. In addition, as was stressed in the Debate, A.I.D. by agreement between the husband and wife leads inevitably to perjury when particulars of the father are given for the purpose of registration of birth and also gives rise to possibilities of fraud in connection with succession to estates and titles. To some extent all these dangers already exist in the case of any offspring conceived as a result of clandestine adultery, but whereas in the latter case the true facts are known to at least two persons in the case of A.I.D. the true father is known only to a doctor sworn to secrecy.⁸

In the light of these considerations the Archbishop's Commission recommended that A.I.D. should be made a criminal offence. Some support for this was expressed in the Debate but it was cogently argued that the only consequence would be to drive the practice underground and out of the control of responsible medical practitioners. There was, however, general agreement that the two problems, of the effect of nullity decrees on legitimacy and the practice of artificial insemination, required earnest consideration, and this the Government promised they should receive, though they refused to accede immediately to a demand for a Royal Commission.

L. C. B. GOWER.

⁵ They based themselves mainly on dicta in the Canadian case of *Orford v. Orford* (1921) 58 D.L.R. 251 and of Lord Dunedin in *Russell v. Russell* [1924] A.C. 721. Lord Merriman, in refreshingly unjudicial terminology, described this view as 'absolute nonsense' and had no difficulty in showing that Lord Dunedin's remarks did not in fact support it.

⁶ Particularly as it is theoretically possible for one donor to sire 20,000 children annually (Commission's Report, p. 10).

⁷ Until the *Russell v. Russell* rule is abolished as recommended by the Denning Committee, he might find it difficult to disprove it.

⁸ And may not be known to him, e.g., where the semen is obtained from a 'bank'.

REVIEWS

INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES. Essays in Honor of Roscoe Pound. Edited with an Introduction by PAUL SAYRE. [New York : Oxford University Press. 1947. x and 807 pp. 63s.]

If essays are to be written in tribute to famous men of letters there is no one who deserves the honour more than Roscoe Pound. The editor of the present massive *Festschrift* has evidently spared no pains to make it as representative as possible of all the main streams of jurisprudential thought, and the list of contributors is imposing. In all there are thirty-eight essays by as many different writers. In addition to the Introduction, two of these essays are on Pound himself, Kocourek contributing reminiscences of Pound as a colleague, and Patterson giving a useful survey of his theory of social interests. Jerome Frank produces a lively study of Blackstone, from which his subject emerges badly tarnished. De Bustamente y Montoro writes on Kelsen, Mendizábal on F. de Vitoria, Martínez on Lask, Jaeger on the Greeks, J. Walter Jones on Cino da Pistoia, and Meyendorff and Timasheff on Petrasyski. (It is to be wished that agreement should be reached on the English rendering of this last name, for it appears also in the book as Petrazhitsky and Petrajitsky.) There are general essays by Cairns on philosophy as jurisprudence, by Cowan on Pragmatism, by Hall on 'integrative jurisprudence', and by Del Vecchio on the obligation of honesty. The problem of natural law and of justice attracts several writers, including C. K. Allen, Chroust, Hocking, Kelsen and Laserson. Goodhart and Sorokin pursue with zest the proper definition of the word 'law'. The relation of law and fact is studied by Radin and Helen Silving. Max Rheinstein discusses restraints upon the judges in the pronouncement of law. Ranyard West's article may be commended as an exposition of modern psychological theories in their relation to law. On the historical side, McIlwain contributes some interesting reflections on the danger to historians of failing to realise changes in the meanings of words, and Von Mehren writes on the judicial attitude to legislation in Tudor England. Winfield outlines the activities of the Law Revision Committee. Mitchell Franklin writes on the legal system of Nazi Germany, and Lord Wright contributes a paper on war crimes, in which he rejects outright the maxim *Nulla poena sine lege*.

With an omnibus volume of this sort the reviewer has performed his main duty if he informs the prospective reader what is in it. No lawyer of broad interests could go through this volume without coming across many passages that reward the reading. Yet it must be confessed that, having regard to the galaxy of talent employed in producing the book, the net result is somewhat disappointing. Apart from Helen Silving's analysis of the relation between law and fact in the light of Kelsen's theory, there is hardly an article that appears to the present reviewer to make a serious contribution to jurisprudential thought, though a number of them are useful assessments of figures of the past or restatements of work that has been done before. This lack of original thinking may well be due to war-time disturbances. Some of the contributors (not noted in the list above) have merely submitted extracts from their own larger works which they have since published in book form, or else have given summaries of their books published previously. It is not intended to refer here to these particular contributions, since the arguments contained in them are best considered by reference to the books from which they are extracted.

It must sorrowfully be added that one or two of the articles in the book are open to the charge of excessive verbosity and obscurity. Carlos Cossio's contribution entitled 'Phenomenology of the Judgment' appears to be erected (if one may be so hardy as to attempt a guess as to its meaning) on two propositions: that a legal rule is a judgment of value, and that a judge has a certain discretion in applying the legal rule. These two simple propositions are spun over forty-four closely printed pages and dressed in a somewhat pretentious terminology. The same type of criticism may be levelled against Siches' 'Ideas and Historical Conditioning in the Realisation of the Juridical Values'. It is a pity that no contributor to the volume can review it; otherwise one would have liked to see a commentary by Judge Frank on the obfuscation of jurisprudence by some of his fellow contributors.

G. L. W.

A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750. VOLUME I: THE MOVEMENT FOR REFORM. By LEON RADZINOWICZ. With a Foreword by the RIGHT HON. LORD MACMILLAN. Published under the auspices of the Pilgrim Trust. [London: Stevens & Sons, Ltd. 1948. xxiv and 853 pp. 70s. net.]

THIS learned and imposing volume, which is principally concerned with capital punishment, might well have used the words of Albert Sorel which Maitland placed on the title page of the Year Books: *c'est toute la tragédie, toute la comédie humaine que met en scène sous nos yeux l'histoire de nos lois. Ne craignons point de le dire et de le montrer*. The author has not feared to tell the disquieting story of eighteenth-century society with its sharp contrasts of intellectual curiosity and practical heedlessness, of belief in progress which was not implemented by a desire of change, of a widespread sensibility and urbanity beneath which lay a vast London populace which generally was not so much savage, as callous with a sort of good-humoured brutality. Nor were these contrasts a matter of class distinction, for the nobility with all their culture enjoyed the vast spectacle of public executions with as much zest as the artisan and the mob. Nor need we fix these contrasts on the eighteenth century alone, for to some extent they represent divergent tendencies which at all times have disputed the ascendancy over the individual man.

It is as social history that the author presents his material in this volume, and the material is all concerned in one way or another with capital punishment. We are shown the motives which led the Legislature to impose the death penalty, and how such legislation was treated by the courts, and mitigated by the application of the prerogative to commute the penalty. We are given such statistical information as can be found about the number of executions, and a most striking chapter on the final rites, based upon a formidable mass of evidence which vividly displays the proceedings from the last night's carouse at Newgate to the slow progress to Tyburn sustained by flowers, prayers and drinks, and accompanied by an elaborate folk-lore—scenes which even the art of Hogarth only just succeeds in making credible.

Grotesque and macabre, these spectacles were the delight of vast crowds which might be sentimental or riotous as the mood took them. To thoughtful men, however, they posed a problem, and the author has devoted considerable pains to recovering the reflections which these scenes provoked in the minds of all sorts of men. Of Montesquieu, Beccaria, Fielding, Romilly, Bentham, we all have heard, and Dr. Radzinowicz contributes abundant detail and careful analysis to their well-known work; but he has done

more, and has assembled much material from pamphlet literature which is of peculiar interest. The course of history must not be made to seem too easy by presenting only the movements which succeeded, and the leaders who finally won their victory. Here the author has been fair with us; he has not stacked the cards, but has given us the facts as they come. Many writers (one of whom, Paley, was a man of first-rate ability) argued that the existing system was correct in its principles, and needed only more systematic and drastic enforcement. By showing how strongly and plausibly that view was held, the author shows the real dimensions of the problem and the magnitude of the victory won by the reformers.

Pages 231-607 are a massive history of penal thought, public discussion and agitation, and parliamentary proposals for the abolition of the death penalty for large numbers of crimes; the story runs from the Commons' committee of 1750 to the series of consolidating Acts passed by Peel in 1827, 1828 and 1830. The mere enumeration of these topics shows the range of Dr. Radzinowicz's work; only those who have examined it carefully can appreciate the depth and thoroughness of his treatment. The bibliography alone runs to fifty pages, and this vast documentation has been not only listed but read, digested and placed at the reader's immediate disposition in the footnotes to every page. The straiter sect of authors would regard many of them as discursive; so indeed they often are, but not irrelevant. The anecdote, the bit of biography and the corroborative detail all serve to satisfy the reader's legitimate curiosity about persons and events, and emphasise the author's fundamental assumption that his subject is an inseparable part of the whole social history of the period. An example is the subject of foreign travellers in England who remarked upon the enforcement of criminal law; the bibliography of travellers' tales covers four pages and their evidence is presented in twenty-eight pages of high interest. Many readers will be grateful to the author for sharing with them the results of his lively curiosity and broad literary interests.

Although the theme of this volume is the movement for reform, the technical history of criminal law could not be avoided. The difficulty seems to have been to find a place for it. Larceny from houses and shops, and the Waltham Black Act, are discussed in detail at an early stage of the book, and many other specific crimes are discussed incidentally as part of the story of reform; a weighty appendix analyses those offences which became capital as a result of eighteenth-century legislation, and yet another appendix deals with the case law on certain larcenies, and on arson. This is all difficult matter which the author has elucidated with skill and brevity, but as he points out, the death penalty attached to a large and very miscellaneous collection of offences. If any classification of old criminal law is possible (which is by no means certain) then the historical plan seems the most promising. The publishers give no indication of the plan of the remainder of the work, and so its future shape can only be guessed. It is greatly to be hoped that the strictly legal history will not be submerged by the social aspects of criminality, however valuable and interesting the latter may be. The neglect of all aspects of crime and its history in this country is a long-standing tradition and so the high hopes raised by this splendid book may be mingled with a trace of anxiety. The publishers have made it clear, however, that three more volumes are contemplated, and that perhaps should satisfy us.

The subject of this first volume has recently aroused excited argument, as it did in the later eighteenth century, and it is a relief to turn to Dr. Radzinowicz's sober pages. The different currents of opinion are all presented here with the sympathy due to men who were honestly trying to understand a problem which modern research has shown to be even more complex as it is more deeply studied. That alone would make a notable book. Add to it the tireless research, extensive knowledge of the European social background,

and the easy mastery of the tortuous law and legislation of eighteenth-century England, and the result is an outstanding achievement of scholarship. In these difficult times a work of this size and sort is hard put to it in competing with the normal needs of professional literature: the publishers' enterprise deserves commendation. That the laborious preparation has been made possible by the Pilgrim Trust shows not only the high importance of the work, but is also one more item in the long account of that body's discriminating patronage of learned undertakings.

T. F. T. PLUCKNETT.

AN INTRODUCTION TO CRIMINAL LAW. By RUPERT CROSS, M.A., B.C.L., and P. ASTERLEY JONES, LL.B., M.P. Second Edition. [London : Butterworth & Co. 1949. xviii and 330 pp. 21s.]

THE authors divide their *Introduction to the Criminal Law* into nearly 200 succinct propositions, each followed by a lengthy explanation. This time-honoured form of arrangement carries with it certain obvious dangers, not the least of which is the risk of inevitable oversimplification in the general propositions. It is all the more to the credit of Messrs. Cross and Jones that misgivings on this score are rapidly dispelled as one reads this excellent new work which throughout comes up to the highest standard which can be set for a students' textbook and makes stimulating reading for any lawyer.

Messrs. Cross and Jones recognise that many of the topics discussed are of highly controversial nature; they present their subjects with lucidity and discretion and do not hesitate, wherever necessary, to indicate open questions by adding a 'probably' to their general proposition however short. Subsequent explanation is always full and to the point, but in some cases of striking thoroughness, as for instance in the article dealing with Mistake. The views expressed in the interesting discussion there arising out of the bigamy cases have found confirmation in the recent case of *R. v. Dolman* [1949] 1 All E.R. 813.

Criminal Law is concerned with crime and punishment, but there has long been a tendency to concentrate on the general principles of criminal liability, the definition of individual offences and, to a lesser extent, the trial. The result has been that the theory and practice concerning the aims of punishment and the treatment of the convicted offender, including the activity of prison administrations, probation officers and corrective institutions have received less attention and appear less well adapted to modern requirements than the substantive law. It is therefore to be welcomed that Cross and Jones includes a Part dealing with the machinery of the Criminal Law and with the execution of sentence, and that the authors have been able to incorporate, in the second edition, the Criminal Justice Act, 1948, which marks an important step on the way towards redressing the balance.

The authors rightly consider that the readiness of modern legislation to impose criminal liability independently of moral blameworthiness tends to bring the criminal law into disrespect. This is not the only factor at work. The ubiquity of criminal offences created by statute during the past twenty years 'for the achievement of the policy of the Government of the day', the increasing frequency with which legislation, especially delegated legislation, threatens punishment for failure to do certain acts rather than for acts of commission, and the ready use of the term 'crime' for trivial offences such as failure to complete forms have all combined to deprive criminal offences of some of their social stigma. There has always been a complaint that, if it be the purpose of the criminal law to regulate social conduct and to tell the individual what he must and what he must not do, the first requisite is that all concerned should be able to know what the law is. Since this has proved a hopeless quest, it is difficult to avoid the conclusion that the criminal law

serves more and more the purposes of the State as an abstract proposition rather than the individuals who compose it.

The length to which modern legislation may go is neatly illustrated by *R. v. Larssonneur* (1933) 149 L.T. 542, though the authors of the 'Introduction' are no doubt justified in considering the relevant statutes exceptional. The discussion of this case, by the way, is hardly compatible with the sentence 'the behaviour of the accused must be shown to have been voluntary' in the next following paragraph (p. 35). There are one or two other, very minor points on which it may be permissible to differ from Cross and Jones. *R. v. Butterwasser* [1947] 2 All E.R. 415 seems to make it clear that even by suggesting that a witness or witnesses for the prosecution were involved in the crime or that, by reason of their conduct, they are unreliable, the accused does not necessarily put his character in issue, as seems suggested on p. 301. That a person is innocent can hardly be described as a rebuttable presumption in the same way as, *e.g.*, the presumption that a marriage which was duly celebrated is lawful (p. 303). The so-called presumption of innocence does not shift the burden of proof; it is not, I think, a true presumption at all, but a convenient figure of speech to indicate that in criminal proceedings the prosecution must prove its case. On p. 297 it might have been mentioned that privilege against incriminating questions also covers those questions which tend to incriminate the spouse of the witness.

The scant number and trifling nature of these suggestions makes it, I hope, clear that this new book, which has already reached a second edition within a year of its first appearance, is a very valuable and accurate guide to the Criminal Law. It will no doubt rapidly and deservedly take its place among the leading textbooks for students and teachers of law.

H. A. HAMMELMANN.

CURRENT LEGAL PROBLEMS, 1948. Edited by GEORGE W. KEETON and GEORG SCHWARZENBERGER on behalf of the Faculty of Laws, University College, London. Vol. I. [London: Stevens & Sons, Ltd. 1948. vii and 248 pp. 17s. 6d.]

Who has not had that most disappointing experience of having bought a book with a most intriguing title, which on closer inspection proved to be utterly trivial or even boring? The present work may well be recommended to those who having had such an experience, feel that they deserve some compensation from the Goddess of Fate. For behind an unassuming title there are hidden a number of essays which can hardly fail to be of vital interest to any member of the legal profession. If there are still some people who are so old-fashioned as to think that reading a book on law may be a duty, but cannot be a pleasure, let them start reading this collection of essays. They will soon enough come to see the error of their ways.

All the essays in this book are reprints of lectures given at University College, London. Most practising lawyers will—like the present reviewer—have found it impossible to attend any one of them. This book enables them to minimise their losses. Though no print can replace the living word, enough has been captured of the vitality and lucidity which every good lecture must possess to make this collection outstanding for skill in exposition and selection of topics. If the present reviewer were asked to recommend to lawyers attractive reading material for a quiet leisure hour, he could not think of anything better to recommend than this volume.

Professor Jolowicz' opening essay on 'Bentham and the Law' cannot fail to hold any reader spellbound. There could be few more attractive topics than the love-hatred relation between the law and this strangest of all the Benchers of Lincoln's Inn. Professor Jolowicz, using all the arts of psychological understanding and all the charm of an accomplished essayist, has

made the most of his topic. In this essay he has reached the level of interest of a good psychological novel, though he has, of course, far surpassed its standards of accuracy and truthfulness. Professor Keeton's admirable essay on 'Legal Responsibility for Political Acts' draws a most interesting parallel between the modern political trials—from the trial of Petkov to the War Criminal Trials—and the political trials of English legal history. It constitutes an implied plea for understanding, which in no way lessens the need for condemnation of any abuse of legal procedure for political ends. Professor Graveson's lecture on the 'Frontiers of the Common Law' must have been an inspiring event to those privileged to listen to it. Perhaps his enthusiasm has occasionally carried the author a little too far. Civilian lawyers will find that it is a little unfair on the civil law, which after all is the law of freedom-loving countries like Holland, Switzerland, Sweden, France and many others, to identify it with the rule, '*quod principi placuit habet legis vigorem*'. To call the English doctrine of the binding force of precedents 'sound and logical' appears a little too generous, if one remembers the severe criticism that it has received from Mr. Justice Holmes (Collected Papers (1920), p. 187). But perhaps it is in the nature of apologetics that such overstatements are unavoidable. The stirring exhortation with which the lecture ends must have been deeply impressive to the lecturer's audience.

Mr. O'Sullivan has the merit of having introduced a bone of contention. The thesis which he tries to prove is that 'the laws and institutions of England are now being directed to the unmaking of the type' of man whom the English common law tried to create. The eminent author has perhaps not always escaped the danger of becoming a mere *laudator temporis acti*. His criticism sometimes sounds ominously like that of contemporary French law by the Pétainist Ripert in his well-known 'Régime démocratique et le droit civil'. But it would be unfair to the learned lecturer to overlook that similar criticism of modern developments has also been voiced from very different quarters, as, e.g., in Röpke's writings on the *civitas humana*. Whatever one may think of the thesis, there can be no doubt that the author has defended it most brilliantly.

The following three articles deal with questions of constitutional and administrative law. Mr. R. C. Fitzgerald advocates a reform of the House of Lords after having surveyed in a most lucid exposition the state of the existing controversy on this point. This survey brings him to the somewhat startling, though well argued conclusion that the House of Commons is in greater need of reform than the Upper House. The proposal that the Lords Spiritual should be removed from the House will probably not recommend itself to those who—like the present reviewer—value the influence of religion on public life. Mr. D. Lloyd's treatment of Ministers' Powers constitutes a most readable introduction to another hotly debated problem. His conclusion that Parliament rather than the courts is the proper forum for the review of the activities of Ministers is not very reassuring to those who have just heard from Mr. Fitzgerald, how little time is left to Parliament even for legislative business and how much the individual Member is dependent in the exercise of his functions on the Government of the day.

Mr. Marshall has contributed a very clear exposition of the law relating to the prerogative of mercy. His article includes a most instructive summary of the recent sensational Gold Coast murder case. Mr. Hanbury reviews in his well-known colourful language the relations between employers and employees, coming to the conclusion that both Trade Dispute and Trade Union Acts of 1927 and of 1946 were parturitions of mountains giving birth to a 'very ridiculous mouse'.

Those readers who should be unable to read Professor de la Pradelle's contribution in French have every reason to regret it, because here is a statement on the place of the individual in international law that, with all its brevity, evidences in every line the hand of a master. The argument ranges

from Grotius down to the tribunal of arbitration set up in 1947 to allot the compensation payable to French owners of nationalised undertakings in Poland. There is a strange contrast between the hopeful note on which this article concludes and the much more pessimistic tone sounded by Dr. Schwarzenberger in his admirable survey of British state practice in respect of the protection of human rights. Dr. Schwarzenberger's conclusion, reached after very careful investigation, is that the standards of protection attained in the past appear today highly enviable and that 'more than ever before in modern times the individual is helpless unless organised in powerful and militant groups'. The practitioner's experience will probably make him inclined to agree with Dr. Schwarzenberger's realistic pessimism, however much he may hope that Professor de la Pradelle's idealistic hopes may come true in the future.

The rest of the volume is devoted to four studies of comparative law, every one of which will be considered as a most important addition to comparative studies in the English language. The essay on Chinese Law and its reform by His Excellency Dr. Tien-Hai Chang, the Chinese Ambassador in London, is a model of that combination of legal learning, philosophical wisdom and graceful charm, which those who have the privilege of knowing the learned author will expect to find in any work from his pen. It would be difficult to give more instruction on a field that constitutes a closed book to most readers than is done in this article and certainly impossible to give it in a more attractive manner. Mr. Leslie Green has contributed an article on law and its administration in present-day Japan which gives an excellent survey of important and, to say the least, strange events in that far-off corner of the world. Many of his readers will learn with disquiet of some of the decisions of the War Crime Tribunals set up under the auspices of the Far Eastern Commission. Dr. Zagday's article on modern trends in Islamic law will be studied with great interest not only by students of that law, but by many others who are interested in the problems of contemporary religious legal systems. It is obvious that the problems which he has most lucidly explained are faced today also outside the Muslim community, as, *e.g.*, in the State of Israel and in India. Professor Vesey-FitzGerald brings the volume to a worthy conclusion by an exhaustive and critical study on the problem of mixed marriages. There can be little doubt that the textbooks on conflict of laws will require careful rewriting in the light of this article.

The Editors deserve to be congratulated on their achievement in bringing together within a comparatively small compass so many important, attractive and varied contributions. According to the preface it is one of the purposes of this volume to give an opportunity to academic teachers of law to address a wider audience than is usually at their disposal. One can only wish that this hope may be fulfilled and that this volume may become the first of a series which may go on *ad multos annos*.

E. J. COHN.

CASES IN CONSTITUTIONAL LAW. By D. L. KEIR, KT., M.A., LL.D., and F. H. LAWSON, M.A., D.C.L. Third edition revised. [Oxford University Press, London: Geoffrey Cumberlege. xxviii and 530 pp. (and 13 pp. of Index). 25s. net.]

THE first edition of this book was published in 1928. The second edition, published in 1933, was printed photographically from the corrected sheets of the first edition, with the result that the changes made were few. The present edition has been printed from the sheets of the second edition and an Appendix of fifty-six pages added. This Appendix contains notes on and in some cases modifications of many of the statements in the body of the book, substantial

extracts from the Crown Proceedings Act, 1947, full reports of *Duncan v. Jones* [1936] 1 K.B. 218 and *Ndlwana v. Hofmeyd*, N. O. [1937] A.D. 229, and long extracts from *Ellen Street Estates, Ltd. v. Minister of Health* [1934] 1 K.B. 590, *Christie v. Leachinsky* [1947] A.C. 573, *Liversedge v. Anderson* [1942] A.C. 206, *Riach v. Lord Advocate*, 1932 S.C. 138, *Ellis v. Dubowski* [1921] 3 K.B. 621, *Moore v. Att.-Gen. for the Irish Free State* [1935] A.C. 484, *British Coal Corporation v. The King* [1935] A.C. 500 and *Att.-Gen. for Ontario v. Att.-Gen. for Canada* [1947] A.C. 127.

This Appendix is reasonable both in the nature of the material selected and in the amount of space given to it. The authors were presumably forced to use the method of the Appendix for the exigencies of the publishers. The result is not very satisfactory. If the authors had had a free hand two chapters, Chapter VI on Remedies against the Crown and its Servants, and Chapter XII on the Overseas Dominions of the Crown, would have been completely re-written. Substantial amendments would have been made in at last three other chapters. This being a standard work for students, it is much to be hoped that Mr. Cumberlege will agree to re-set the type as soon as this edition is exhausted. When that is done, the authors might consider dropping Chapter XII, which must inevitably be too short to be very useful. What is wanted for first-year students is a small case-book of about one-half (or perhaps less) the size of that which Miss Young and I published for more advanced students in 1938, not a single chapter in a book devoted to English law. This would enable the book to be brought back to its original size.

It should be added that the preliminary tables and the index contain no reference to the Appendix, which therefore has no means of reference.

W. I. J.

A MANUAL OF INTERNATIONAL LAW. By GEORG SCHWARZENBERGER.
[London : Stevens & Sons, Ltd. 1947. 1 and 428 pp. 25s. net.]

SINCE the learned author's book on *International Law as applied by International Courts and Tribunals* was published, as an abridgment of which he—very modestly—describes the present manual, a new period of international relations has begun by the collapse of Germany, the conclusion of peace treaties with her former allies and the establishment of the United Nations, and this seems to the author an appropriate moment for drawing up afresh the balance sheet of international law.

According to the Preface it is the purpose of this manual to provide an educational aid to the student as well as to the layman who wishes to make himself acquainted with the system of international law. But the work is more than only an introductory manual and can helpfully be used not only on the lower levels of study of international law. The approach of the learned author—as is well known from his previous books—is in favour of the inductive method, and he presents the system of international law through the mirror of international judicial institutions, particularly through the decisions of international courts and tribunals, first of all the judgments and advisory opinions of the Permanent Court of International Justice, and he supplements this picture by reference to Anglo-American State practice. This method to present international law as applied, and to derive general rules from the actual facts, keeps its adherents aloof from the danger of taking a Utopian view of international law. Professor Schwarzenberger does not shun to face facts, for instance, the limited functions of law within the orbit of the rule of force. Disappointing as it may be, it is nevertheless a fact, as the author points out with great lucidity (page 2), that so long as the existence of a sufficiently integrated community is far from being a reality, and that so long as world society has not developed governmental legislative and judicial institutions which are comparable to similar institutions within the State,

international law, to a considerable extent, will be subservient to power politics. The book was finished in February, 1947, and altogether the author's pessimistic view on the functions of international law has proved to be true. That applies particularly to the various patterns of world order which have been suggested from time to time in order to transform the quasi world order of the League of Nations or United Nations into a world order proper. In spite of various suggestions, it has not been possible to transform the United Nations, the Charter of which, and—a very useful addition—a list of the members of their principal agencies are given in an Appendix, into an institution with governmental and executive functions failing which any international authority remains more or less ineffective. The frankness with which the learned author states the problem and describes the difficulties which have to be overcome if a world State is to be created is all to the good. Neither from the scientific nor from the political point of view is it any use to shut the eyes against the reality and to indulge in chimeric conceptions which, in the present state of international society, cannot be realised.

The author proposes to give only the basic principles. For further studies the reader is referred in Part 2 of the book to study outlines. Each chapter of Part 1 (altogether 9) has a corresponding chapter in Part 2 where the leading cases and the principal textbooks are quoted and the reader is invited to study the problems enumerated there and to form his own opinion. 'The beginner'—so the learned author sets out—'should be encouraged at the earliest possible moment to stand on his own feet, and it is the purpose of these study outlines to make his first walk an enjoyable and exciting journey into the unknown.' Not only the beginner but also readers who are already acquainted with the fundamental principles of international law will find these study outlines a valuable help for the enlargement of their knowledge of international law and will find still more useful material in Part 3 which contains a very comprehensive bibliography of legal literature, including collections of international treaties and decisions of international courts and tribunals.

In a book of this kind it is left to the discretion of the author how many details will be given. As the author does not purport to give an exhaustive picture of international law, not all the problems can be dealt with which find their place in the textbooks. The reader, however, may consult the subject index of the book concerning such features of international law as have not been exposed in the book itself and will there be referred to the study outlines where further material is contained. To give one example: Servitudes in international law are not discussed in the book, but are mentioned in the subject index with reference to the pages in Parts 2 and 3 where a full bibliography is to be found.

The author is to be congratulated on a work which gives much more than its title and the preface indicate, and which will prove to be most helpful for all students of international law, not only the beginner, but also persons who are already advanced in their studies.

DR. ERNST WOLFF.

AN INTRODUCTION TO INTERNATIONAL LAW. By J. G. STARKE.
[London : Butterworth & Co., Bell Yard, Temple Bar. 1947.]

THE author of this valuable textbook of International Law makes it clear that it does not purport to be a full or complete treatise, but rather a short practical introduction to International Law which will provide intending international officials, diplomatic recruits and university students with the basic knowledge for coping with day to day problems of International Law.

Those of us who have had some experience in post-war bilateral or multi-lateral negotiations between governments, may have noticed that many

delegates to conferences of an international character seem to have little or no knowledge of International Law. Such a state of affairs must contribute to the generally low level of international negotiations. International Law can and should provide the common language between negotiators from different countries; it enables them to clear up misunderstandings, to formulate real problems and differences, and so to open the way to agreement, or at least part-agreement.

Every university student who intends to become a diplomatic recruit should therefore be equipped with this minimum of International Law which is needed to understand diplomatic practice. This applies even more to international officials who, as a new class of civil servants, try to work out world government in practice.

In the light of the above one wonders, in reading the contents of J. G. Starke's publication, why the author has practically left out international organisations from his book. Out of a total of 293 pages, the author devotes about 50 pages to International Law in general, 70 pages to subjects of International Law, another 70 pages to Rights and Duties of States, 40 pages to international transactions, another 40 pages to disputes, war and neutrality, and two and a half pages to international organisations. The size of the last two chapters invites comment. In his Preface the author says that, in accordance with the scheme of the book, the discussion of the law of War and Neutrality has been considerably condensed. He considers that this step is justified as a substantial portion of the rules of war and neutrality concern Municipal Law rather than International Law, and in any event are more appropriate for treatment in manuals on military, naval and air force law. The author also considers that it is anomalous to overburden the student 'with the mass of detail concerning neutral rights and duties, belligerent occupation and Prize Court adjudications, as has become a traditional feature of university lecture courses and a good many textbooks'. He believes that such a practice serves neither a cultural nor a practical purpose.

Whatever the average student of International Law may think of this kind of approach (I am glad the author confined himself to the cultural and practical purpose, leaving aside the theoretical aspect of the subject), it seems to me astonishing to devote only two and a half pages to international organisations. Neither the university student, nor the diplomatic recruit, even more so the international official can cope with day to day problems of International Law without a thorough knowledge of international organisations. The author dismisses them in a short note in which only the United Nations Organisation and the International Labour Organisation are mentioned, and even vital problems concerning these two organisations are not discussed, as, indeed, would be impossible in two and half pages. There is no mention of the League of Nations and of all the present post-war international organisations such as the specialised agencies, the Bretton Woods agreements, etc. The reader of J. G. Starke's present publication must therefore add to the 293 pages of the book at least the same amount of reading concerning international organisations in order to prepare himself for the tasks for which the author would have him be prepared.

Without any historical introduction to the subject the author starts the book with Professor Hyde's definition of International Law, and discusses the vital problem of whether International Law is law at all; he should not be blamed for giving only a summary of pro's and con's, I personally miss a useful comparison between International Law and Canon Law which helps to understand law unsupported by physical (external) force. The author mentions the natural law theories and positivism, but does not unfortunately include a discussion of the inductive method which the student of International Law enjoys in Dr. Schwarzenberger's recent publications. The author becomes more theoretical in the chapter concerning the relation between International Law and State Law where a certain amount of philosophical considerations appear.

The following chapters are treated from a rather more practical point of view, often in a summary which may help the student to acquire encyclopædical orientation. The author provides the reader with a useful selection of cases, though a more detailed discussion of some of them, *e.g.*, the *Eastern Greenland*, and the *Tunis and Morocco Cases*, would have been valuable in a book concerned primarily with practical problems.

C. ALEXANDROWICZ.

RETALIATION IN INTERNATIONAL LAW. By EVELYN SPEYER COLBERT.
[King's Crown Press. London: Geoffrey Cumberlege. 1948.
228 pp. 16s. net.]

LIKE Humpty Dumpty Mrs. Colbert is a believer in precautionary definition. Retaliation is here used as a general term to cover extraordinary measures, which would normally be unlawful and which have occurred in time of peace or war since the Middle Ages. In this way dispute as to the province of reprisal, retorsion and retaliation is avoided. The book is in two distinct sections. The first deals with peacetime retaliation, the second with retaliation in naval war.

A study of private peacetime reprisals leads to the conclusion that, notwithstanding such notorious exceptions as the piratical Bartons who relied for thirty-five years on letters of reprisal granted in 1476, this method of redress achieved a considerable degree of uniformity. 'Its essential features were the existence of a pecuniary claim, the failure of the claimant to obtain satisfaction through his own efforts, the subsequent failure of the sovereign's efforts to secure justice for his subject and, finally, authorisation by the sovereign of seizure (whether by state agent or private individual) of goods of subjects of the offending state to the amount of loss plus reasonable costs.' The decline of private reprisals is accounted for by increased safety in international trade, the more orderly administration of strong central governments, and, less convincingly, decreasing partiality of judges to their own nationals. When State interests were at stake, however, there was no legal remedy between diplomatic protest and war. To fill the gap public reprisals developed as a means of persuasion. If property seizure continued the purpose was now coercion not compensation—a means not an end. On the vexed question of proportionality the author concludes that the statement of the Court in the *Naulilaa Case*—'one must consider as excessive and consequently illicit reprisals out of all proportion to the act which motivated them'—was pious aspiration rather than a reflection of State practice. Moreover, the purpose of such public reprisals being coercive—'measures to remain in force until the attainment of some satisfactory arrangement'—it is argued that proportionality may not be in point. Such argument, however, is inappropriate to cases like the *Barrier Forts Incident* of 1856 where retaliation involved the death of 400 Chinese, or the *Greytown Case* where a whole community was destroyed. In such cases the results of coercion are not temporary; and, indeed, the conclusion reached on public reprisals is that the widening of the gap between great and small powers in modern times has accentuated the likelihood of abuse of the means employed to secure redress. The author suggests that the Charter of the United Nations has as its aim the elimination of retaliation, and that such gaps as may be found in the Charter are in part closed to those who have accepted compulsory jurisdiction under the Optional Clause of the Statute of the International Court of Justice. The submission to jurisdiction of the *Corfu Case* by Great Britain and Albania is cited as an example: but the opinion of the minority of the Court on the point of Preliminary Jurisdiction in that case, and memory of Answer No. 4 by the Committee of Jurists in the *Corfu Incident* of 1923 are not encouraging. It

seems unlikely that States will abandon so profitable a weapon of coercion in favour of dilatory negotiation, at least where "honour" or vital interests are at stake and disparity in power is obvious.

Section II deals with Retaliation in Naval War. Neutral reprisals in the seventeenth and eighteenth centuries and the Anglo-French conflict in the Napoleonic Wars are discussed at length. The retaliatory decrees rested ostensibly on the dual assumption that the employment by a belligerent of illegal methods of warfare gave the other belligerent a right to use similar measures, and that if a neutral failed to make effective protest to the first belligerent he could not complain of retaliation: in reality the decrees were tactical steps in a commercial struggle—'if you will not have *our* trade, as far as we can help it you shall have *none*'. Similarly, but to a greater extent in the two world wars retaliation was invoked not to coerce a belligerent to stop illegal acts, but to further a 'total warfare' to which traditional law on neutrality and belligerent rights bore little relation.

The author devotes more than forty pages to the Napoleonic Wars, and a footnote to the recent war. What then is the purpose of the book? It is stated to be the discovery of State practice in regard to retaliation 'in certain periods or types of situation in which the employment of the doctrine has been particularly widespread or significant'. If the purpose were purely historical then it would be enough to say that it is concisely and interestingly accomplished. However this is not all—'what is sought is the function of a doctrine of retaliation in an International legal system'. This smacks of abstraction. What is needed is a discussion of the function of retaliation today. The author is well aware, and convincingly demonstrates, that International Law changes with international conditions, but it is unfortunate that more space could not have been given to a discussion of the 'compulsory navicerts' reprisals by Great Britain in the recent war, which illustrate very well the use of retaliation to 'reform' an outdated law. With this reservation the book, which includes a useful bibliography of primary and secondary sources, provides an excellent historical and analytical treatment of a difficult subject.

G. D. G. HALL.

LAW REPORTS OF TRIALS OF WAR CRIMINALS. Selected and prepared by the United Nations War Crimes Commission. [London: H.M.S.O. 1948. Vol. 3, xi and 123 pp. 5s. Vol. 4, ix and 180 pp. 5s.]

Of the fourteen trials reported in these two volumes only two took place in the Far East, one before a British Military Court and the other before an American Military Commission. The cases heard in Europe illustrate the practice of five different legal systems, both military and civil. Two of the cases were heard by the Norwegian *Eidsivating Lagmannsrett*, and in each case there was an appeal to the Supreme Court; one was heard by the French Permanent Military Tribunal at Strasbourg, from whose decision an appeal was lodged with the *Cour de Cassation*; five came before American Military Commissions, three before and two after General Eisenhower's directive of August 25, 1945, was published. This directive established the general rules and principles governing American trials in the future; before that date Commissions were established under the powers enjoyed by the Commanding General, 12th Army Group. None of these American trials needs examination, for the United Nations War Crimes Commission has seen fit to publish the accusations and the findings in each case before the transcript of the proceedings has been made available. What appears is, therefore, merely in the nature of general comment by the members of the Commission's staff. Of the

remaining four cases, one was decided by a Canadian, and the others by British, Military Courts.

The Norwegian cases concerned torture and ill-treatment of Norwegian citizens by senior German officials during the occupation of Norway. In both, the accusations were brought under the Norwegian Civil Criminal Code as amended by the Provisional Decree of May, 1945. Norwegian war crime cases are heard by the normal Norwegian courts and not by tribunals especially established for the purpose. The practice in such cases, therefore, serves a useful purpose from the standpoint of comparative law, and the United Nations War Crimes Commission is to be congratulated on having thus brought Norwegian practice within the reach of English lawyers and students.

In both cases the *Lagmannsrett* found the accused guilty, and in both the decision was upheld by the Supreme Court. The first case concerned the trial of *Kriminalassistent* Klinge, who was responsible for atrocities at Gestapo headquarters in Oslo in connection with the interrogation of civilian prisoners. The appeal to the Supreme Court concerned the validity of the Provisional Decree of 1945. By Norwegian law international law is only part of the law of Norway in so far as it is expressly incorporated into Norwegian law, and by article 97 of the Constitution 'No law may be given retroactive effect'. Under the Civil Criminal Code the crimes of which Klinge was charged were not punishable by death, but this punishment was introduced by the Provisional Decree. The defence alleged that the Provisional Decree by introducing the death penalty was retroactive and so unconstitutional.

The Supreme Court by a majority agreed that the Decree was intended to have a retroactive effect, but considered that it did not offend against article 97 of the Constitution. The majority pointed out that war crimes were already punishable by death under international law, and the Decree of 1945 had merely incorporated international law concerning war crimes into Norwegian law, and had not in any way created new crimes. The right to try an offence arose at the moment of commission, and the Decree had merely altered the nature of the punishment. The Supreme Court also pointed out that the accused knew the nature of his crime and must have been fully aware of the fact that by the laws of war such crimes were punishable with death. The court made one point of particular interest in connection with retroactivity. It pointed out that article 97 was introduced for the protection of the community, and maintained that it would be a denial of this purpose to extend its protection to foreign intruders seeking to subdue the community by illegal action and brutality.

The Permanent Military Court at Strasbourg tried Robert Wagner, *Gauleiter* of Alsace. Unfortunately the editors of the Reports have been so eager to include this trial in their series that they have not waited for the complete records to be made available. It is not entirely satisfactory to be informed that 'some indications of the evidence relied upon both by the prosecution and the defence, can, however, be gathered from references in the indictment to depositions made in the course of the preliminary inquiry, and from the judgment'. Although it may sound strange to English ears for an indictment to be framed in this way, it is fully in keeping with what was done at Nuremberg, for there, it will be recalled, the indictment, in connection with Count One, the Common Plan or Conspiracy, included a brief history of the Nazi Party from 1923 to 1941.

Wagner was charged with various crimes under the French Penal Code, of which the most important seems to have been inciting and recruiting Frenchmen and others to bear arms against France. By an Ordinance of August, 1944, certain offences against the Penal Code, including those just mentioned, were made war crimes, unless they were justifiable by the laws and customs of war. While it may be a war crime compulsorily to enlist the inhabitants of occupied territory in order to embody them in the occupant's armed forces

—for it must be remembered that occupation during the continuance of the war does not act as an annexation and serve to transfer sovereignty—it is difficult to ascertain which of the laws of war makes it a crime for an occupying authority to accept volunteers for his forces from among the occupied population.

In one or two matters the proceedings differ from those more usually reported in this series. In the first place, by the French regulations concerning such trials, members of the *F.F.I.*, both officers and men, are permitted to sit. This may tend to introduce a certain desire for revenge, which is usually absent when regular officers constitute the tribunal. Secondly, for one of the accused the plea of superior orders was accepted. This covered a prosecuting officer who demanded the death penalty under orders. The *Cour de Cassation* decided that a French tribunal could only try a war criminal for offences against Frenchmen or committed on French territory; usually war crimes tribunals regard war crimes as being of universal jurisdiction. Normally, the trials reported in this series show an attitude of complete fairness towards the accused. The Wagner trial seems to suggest that the French courts are not so careful. During the proceedings before the Military Tribunal Wagner applied for certain new witnesses, including Ribbentrop and Keitel, to be heard on his behalf. The court rejected this application: 'The addresses by counsel for the prosecution and for the defence had supplied sufficient material on which the judges could base their decision. The hearing of further witnesses was therefore not essential to establish the truth' (Vol. III, pp. 39-40). The *Cour de Cassation* upheld this ruling on the ground that it is the responsibility of the accused to procure his own witnesses, who must be present at the hearing, and of whom he must give notice before the opening of the proceedings to the prosecutor (p. 44). It would be a little difficult, to say the least, for an accused war criminal himself to secure the presence of a witness held for war crimes by one of the victorious powers.

Two of the points with which the *Cour de Cassation* had to deal concerned the validity of the Ordinance of 1944 and Wagner's personal status. Wagner alleged that as he was a General he could not be tried by a tribunal presided over by a Colonel. The court held that this rule only applied to members of the French forces and to prisoners of war, and as Wagner was being tried as a war criminal and not as a prisoner of war it could not apply to him. As regards the 1944 Ordinance, it was alleged that this was illegal because retroactive—the report of the case is so brief that it is not possible to see why retroactivity constitutes illegality—the *Cour de Cassation* rejected this plea because 'this legal text, duly promulgated, became binding on the (French Military) tribunals and could not be questioned before them on grounds of its unconstitutional nature' (p. 45).

The last case of interest in Volume 3 is the trial before a British Military Court of Erich Killinger, who was accused, with others, of being concerned as a party in the ill-treatment of British prisoners of war. The court announced 'that no amount of mere negligence, however gross, could bring a person within the category of a party as defined in the particulars of the charge; that the word "parties" must of necessity mean that the person concerned must have had some knowledge of what was going on and must have deliberately refrained from stopping such practice; and that the person, in order to be a party, must come within the category of a principal in the second degree or aider and abettor in the ill-treatment alleged' (p. 69).

All the cases in Vol. 4 concern charges against officers for atrocities committed by the troops under their command. The only one that merits attention comes from the Far East. The accused was Tomoyuki Yamashita, formerly General commanding Japanese Forces in the Philippines, and it was alleged against him that 'he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command', who had been guilty of large scale atrocities including the massacre of more than 25,000 people.

Yamashita was found guilty and appealed to the Supreme Court of the United States alleging that the tribunal was illegally constituted and that the charge did not amount to a crime against the laws of war. It is not easy to see whether there was in fact strong evidence against Yamashita, for although there were nearly 300 witnesses the report is most unsatisfactory and the evidence is compressed into just over four pages.

It is generally understood that no witness may be present in the court until he is due to give his evidence; an exception was made in this case, for Lieutenant-General Moto appeared not only as a defence witness but also as one of the counsel for the defence.

Among the grounds alleged by the defence to upset the validity of the proceedings was the charge that the protecting power for Japan was not informed beforehand of the proposed trial. The Supreme Court upheld the rejection of this claim on the grounds that war criminals were not prisoners of war in the normal sense and not entitled to the privileges enjoyed by such prisoners. The defence also alleged that Yamashita's inability to control all the troops under his command was the result of the disruption caused by the advancing American forces and his preoccupation with the course of the battle. For this reason it was not denied that the atrocities had been committed; what was denied was Yamashita's knowledge or his ability to prevent them.

It would be interesting to know whether any military staff would agree with the assertion of the prosecution 'that the performance of the responsibility of the commanding officer toward the civilian populations is as heavy a responsibility as the combating of the enemy' (p. 30). To a great extent it appears as if the Military Commission and the Supreme Court accepted this analysis of a commanding officer's duty, although it is necessary to point out that the Supreme Court declared that it had no power of review over a military tribunal, but is concerned with questions of jurisdiction. By a majority it upheld the legality of the Commission and of its right to try war crimes after the cessation of hostilities, at least until the signing of a peace treaty. In the light of this statement it is not surprising that the court said it was not called upon to review the evidence on which Yamashita was condemned. The Supreme Court agreed that since article 1 of Hague Convention IV concerning the Rules of Warfare on Land required troops to be 'commanded by a person responsible for his subordinates', it was a war crime for a commander to fail to control the activities of his troops who, as a result of such failure, indulged in war crimes.

Mr. Justice Murphy strongly dissented. He paid great attention to the military situation and feared that Yamashita was being tried for no other crime than that he happened to have been General Officer Commanding the Japanese Forces in the area. Due to the inadequate report of the whole trial we may be excused for adopting his words: 'read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: "We, the victorious American forces . . . charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganisation which we ourselves created in large part". . . . To use the very inefficiency and disorganisation created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality' (p. 51).

The appendices of the two volumes are extremely useful, for they reproduce the regulations concerning the trials of war criminals as they exist in Norwegian, French, Canadian and American law. The regulations for English trials were published in Vol. 1, and when the series is complete it should be reasonably easy to prepare a comparative study of the law concerning the punishment and trial of war criminals after the Second World War.

L. C. GREEN.

GERMAN CRIMES IN POLAND. Vol. 2. [Warsaw : Central Commission for the Investigation of German Crimes in Poland. 1947. 171 pp.]

IN many of the victorious countries there has recently been expressed a desire for the early end of the trials of war criminals. This sentiment is not shared in Poland, and this volume on *German Crimes in Poland* helps one to understand why.

The volume opens with a selection of extracts from the diary of Frank, the German Governor of Poland. From these and other documents here published it becomes evident that the German policy for Poland was directed to the biological extermination of the entire Polish people. Those interested in the psychology of totalitarian degradation and sub-humanism can do no better than read these extracts from the diary of the Governor, who glibly wrote: 'When at last we have won the war then as far as I am concerned, the Poles and Ukrainians and their like may be chopped into small pieces'.

Despite the horror that underlies everything appearing in Frank's statements, his comments are as driven snow when compared with the record of events in the Polish concentration camps, the lesson of which is driven home by the reproduction of photographs of the victims of mass murder, and what have erroneously been described as medical experiments, but which were frequently intended merely for the amusement of the vivisectioners of human beings often working without anaesthetics or sterile instruments.

There is little in the volume of specific interest to the lawyer, but Frank has himself provided the answer to those who criticise the Nuremberg Tribunal on the ground that it enforced *ex post facto* law, or punished as crimes activities that the offenders had no reason to imagine would be so considered. On January 25, 1943, Frank saw fit to declare: 'we must not be moved when we hear that 17,000 people were shot. They are also war victims. Let us recall that we are all on Mr. Roosevelt's list of war criminals. I have the honour to be No. 1 on this list. *We have become associates in crime in the world historical sense*' (our italics).

A new world cannot be built on the emotion of revenge, but volumes of this character, and the nauseating photographs they contain, may serve to remind victors and vanquished alike of the philosophy that helped to produce the 1939 war, and which was itself exacerbated by the methods and course of the war.

L. C. GREEN.

PRAWO NORYMBERSKIE (THE NUREMBERG LAW): BILANS I PERSPEKTYWY. By Dr. T. CYPRIAN and Dr. J. SAWICKI. [Warszawa-Krakow. 1948.]

THE authors of this interesting book on the Nuremberg law, two distinguished Polish lawyers who themselves were the delegates of Poland at the Nuremberg trial, make it clear that they did not intend to write a system of international criminal law, which in their view is still 'law in making'. They therefore call their work a 'balance sheet' (bilans) and the perspectives (perspektywy) of this law which they carefully avoid to define.

This seems rather a wise reservation, because the reader (after 600 pages) gets too optimistic an impression as to the contribution of the Nuremberg law to the creation of an international criminal law as an independent branch of international law. The authors treat the subject first from an historical point of view, by using pre-Nuremberg law to explain the present law. They start with considerations concerning war crimes during the first world war and with the unsuccessful attempt to bring Kaiser Wilhelm to trial. In the inter-war

period, most attention is given to the Kellogg Pact, then the authors proceed to discuss all the stages leading to the creation of the Nuremberg Tribunal: first the declaration at St. James' Palace on war criminals in 1942; the Moscow declaration of 1943; the creation of the United Nations Commission for the investigation of war crimes in 1943; and the Charter of the Tribunal in 1945.

In a joint analysis of the Charter, the Trial and the Judgment, the authors draw the attention of the reader to the exclusive influence of Anglo-Saxon law on the procedure accepted at Nuremberg, and of both Anglo-Saxon and Continental law (particularly Soviet law) on the legal principles applied. In considering three sorts of crimes—war crimes, crimes against peace, and crimes against humanity—the importance of Nuremberg law in fighting aggressive wars as the main international crime is emphasised. It becomes a warning that political leaders will in future be held personally responsible for aggression. As to crimes against humanity, the authors believe that each period in history has a 'certain 'legal minimum' (*minimum juridique*), and that States cannot go below this minimum without violating international law. In comparing the present legal minimum with the minimum of the past, the authors strike a positive balance, considering Nuremberg law as a hopeful basis for future developments, in Mr. W. E. Jackson's words: 'The nations, solemnly joined to safeguard the peace, cannot shrink from completing the outlawry of war'.

C. H. A.

THE PRINCIPLES OF PLANNING LAW. By J. CHARLESWORTH, LL.D.
Second edition. [London: Stevens & Sons, Ltd. 1948. xvi
and 164 pp. 12s. 6d. net.]

We gave some account of the first edition of this work in 10 M.L.R. at p. 91. Since then the law on this subject has been revolutionised by the Town and Country Planning Act of 1947. In the result Dr. Charlesworth has completely rewritten his book, except for part of the short historical introduction and a few comments here and there. On this introductory section we may refer to our earlier remarks, and repeat what we then said about the clarity of Dr. Charlesworth's exposition of this complicated subject. The draftsmanship of much of the present Act is highly abstruse, especially, perhaps, in the sections relating to compensation, and particularly where the problem of war damage has to be taken into account. The exposition of this baffling branch of the law is the clearest that we have yet seen: though even so it will undoubtedly call for the student's highest powers of concentration.

It is, of course, to students, and to practitioners requiring a general view of the law that Dr. Charlesworth addresses his book, not to specialists. In the term 'students' we include not only students of the law, but students of the new subject of town and country planning, the youngest of the professions, and one likely to attract many entrants over the coming years. We think that this last type of student who must, for the purpose of preparing himself for his profession, acquire a thorough knowledge of town planning law, can hardly do better than make use of this book, because the exposition is remarkably free of legal jargon. It is not possible to avoid a certain amount of legal technicality, as, for example, such expressions as easement, charitable trust, quasi-judicial, mortgagee and many others. Perhaps the majority of students of this type will at an early stage take a course in the elementary principles of English law, but it might be useful to attempt a glossary of technical legal terms in the next edition.

Another noteworthy point about Dr. Charlesworth's work is its broad sweep. In his first edition he included sections on highways and housing on the very reasonable ground that they are inextricably bound up with planning. The new

Act makes it clear that Whitehall now accepts this view. The law as to ribbon development has now been merged in the Act, and many of its clauses have a close connection with those of the Housing Act, 1936. Dr. Charlesworth retains his separate chapters on housing and highways which are most helpful. In his introduction also he very properly brings into the picture such important problems as those of countryside amenities, national parks, access of footpaths, and nature conservation, which have been the subject-matter of an important series of reports, and reference to which was necessary to complete the picture.

C.

LOWNDES AND RUDOLF ON GENERAL AVERAGE AND THE YORK-ANTWERP RULES. Seventh Edition by A. J. HODGSON and G. R. RUDOLF. [London: Stevens & Sons, Ltd. xxv and 593 pp. (with index). £3 3s. net.]

THIS is really a new edition of the well-known book by the late Richard Lowndes, with which has been incorporated Mr. Rudolf's work on the York-Antwerp Rules. The publishers are to be congratulated on having brought about this amalgamation, since the almost universal use of the York-Antwerp Rules in recent times has made some portions of *Lowndes* of little more than academic value, notably the numerous problems arising from English and foreign adjustments, the one-third rule and similar matters. It should, however, be made clear that Mr. Rudolf's work is not in any sense fused with *Lowndes*, but retains its separate existence within the covers of the one volume. The ideal solution would be to make the two books one by cutting out the dead wood from *Lowndes* and substituting the living growth from *Rudolf*. That this is a counsel of perfection, and a task of complexity calling for much detailed labour, the present reviewer is only too well aware.

As there has been no edition of *Lowndes* since 1922 we may perhaps be permitted to spend a few lines in attempting a general appraisal. Richard Lowndes belonged to a small group of scholarly and erudite shipping lawyers of whom Sir Joseph Arnould was perhaps the most eminent, but which included also men with the profound learning of Maclachlan, and of Duer and Phillips in the U.S.A. These authors were all scholars with a wide grasp of the comparative law of their subject, and a deep appreciation of its historical significance. The type of textbook which they produced is no longer written—it belonged to a more leisurely age—and one cannot help deploring its disappearance, although of course the old masters continue to be kept alive in new editions such as that now under review, a procedure the demerits of which are at least equal to the merits.

The policy of the previous editors, of whom Mr. Rudolf has been one, was to leave the text of *Lowndes* as much altered as possible, and to deal with the later growth of the law in the footnotes. This rather questionable policy has been followed in the present edition, with the result that much of the most practically important part of the book is to be found concentrated in the footnotes.

It goes without saying that in the hands of Mr. A. S. Hodgson, a well-known practitioner in the commercial court and himself the author of a useful book on the Carriage of Goods by Sea Act, 1924, and of course of Mr. Rudolf, the work of bringing both *Lowndes* and *Rudolf* up to date has been efficiently done. One might perhaps cavil at the somewhat cursory treatment accorded to *Tempus Shipping Co. v. Dreyfus* [1931] A.C. 726, and still more at its omission from the index; at the omission of reference to *Athel Line, Ltd. v. Liverpool and London War Risks Association, Ltd.* [1944] 1 K.B. 87 in the index; at the lack of discussion of the important recent case of *Kulukundis v. Norwich Union* [1937] 1 K.B. 1, and other similar secondary points. The

very careful documentation of the U.S. cases, which have of recent years perhaps exceeded the English cases in importance, will on the other hand be most welcome, not only to lawyers, but to those occupied in the insurance market where close attention is paid to the American decisions.

C.

THE KING'S GOOD SERVANT. Papers read to The Thomas More Society of London. [Oxford: Basil Blackwell. 1948. 112 pp. 8s. 6d. net.]

THIS set of Thomas More Papers, dedicated to the memory of the first President of the Society, Lord Russell of Killowen, is introduced by the Secretary, Mr. Richard O'Sullivan, K.C., who tells us that the object of this Society of members of the Bench and Bar is to study and discuss intellectual and moral problems touching law and legislation. The eight papers which follow were read not by lawyers but by various persons who, while not united in admiration of modern English legislation, are at one in their veneration of that champion of the older tradition of the common law, St. Thomas More. The outstanding contribution is Dr. D. J. B. Hawkins' 'Punishment and Moral Responsibility', which readers of this *Review* may remember. A contributor presents the theory of law of St. Thomas Aquinas; a 'plea for a theology of law' is suggested as being 'fully in the tradition of the English Common Law'; and another contributor, in reading *Doctor and Student*, is struck 'not only by its happy unconsciousness of any necessary divorce between legal concepts, principles and practice on the one hand, and those of ethics on the other, but by the fruitful co-operation between the protagonists'. 'I die the King's good servant, but God's first': Sir Thomas More's words on the scaffold supply a fitting title for this small but inspiring collection.

W. H. D. WINDER.

YEAR BOOK OF THE INTERNATIONAL COURT OF JUSTICE, 1947-1948. [Leyden: Sijthoff. London: H.M. Stationery Office. 1948. 160 pp. 10s.]

INDEX TO THE REPORTS, JUDGMENTS, ADVISORY OPINIONS AND ORDERS, 1947-1948. [Leyden: Sijthoff. London: H.M. Stationery Office. 1948. 60 pp. 2s. 6d.]

THE table of contents of the present *Year Book of the International Court of Justice* is almost identical with that of the first volume published in 1947. It is smaller, however, the reason being that to a great extent chapters of the previous issue are written in by way of reference. This means that the present issue can only be used to full advantage if it is consulted in conjunction with the *Year Book* for 1946-47.

In the year that has elapsed since the publication of the first volume of its *Year Book* the Court has issued its Judgment dismissing Albania's Preliminary Objection in the *Corfu Channel Case* and its Advisory Opinion on the Admission of New Members to the United Nations. As published, these two statements cover nearly 100 pages, and the present issue of the *Year Book* serves a useful purpose in summarising them in ten pages. It is unfortunate, however, that in neither case does the *Year Book* give any hint of the contents of the various Separate and Dissenting Opinions delivered by some of the Judges.

For those who are interested in the development of international judicial procedure the collection of texts relating to the jurisdiction of the Court will be of very great value, while to students generally the second part of the bibliography of recent publications on international law will prove extremely useful.

The *Index* of the Court's Judgments, Opinions and Orders cannot be fully appreciated until the Court has established itself sufficiently to encourage States and those specialised agencies which are qualified to apply for Judgments and Advisory Opinions, respectively, to do so more readily than they appear at present. The purpose of the *Index* is to indicate the place in the various Publications of the Court in which any item of interest to the international lawyer, whether it be an article of the Charter or the name of a cited author, may be found. When the published material of the Court reaches appreciable volume this *Index*, which is intended to be an annual publication, will enable lawyers to find the relevant dicta on any point without having to read right through any particular Judgment.

L. C. GREEN.

FINAL LEGAL FICTIONS. By A. LAURENCE POLAK, B.A., Solicitor of the Supreme Court. Illustrated by DIANA PULLINGER. [London : Stevens & Sons, Ltd. 1948. iv and 117 pp. 6s. net.]

FROM opera, mythology and fairy tale the author draws his subjects for a last series of fictitious actions. To please lay and legal public alike, parody and principle jostle each other through the pages. The paradox which faces all parodists of the law is that nothing fictitious can equal in fantasy, fancy and impossibility the facts proved every day in the courts themselves. The labour of being light is not always concealed but much can be forgiven the author of 'Mr. Mephistopheles, of Gehenna, described as a Fuel Contractor', of Don Juan's comments 'which were calculated less to pay tribute to the native modesty of Englishwomen in general than to reflect upon their alleged emotional shortcomings', of 'expert evidence of the law of Spain has satisfied me that seduction is not justifiable according to the law of that country', of 'Marriage for 999 years—whether "marriage for life" and many others.

J. A. G. GRIFFITH.

STANFORD LAW REVIEW. Vol. I, No. I. Annual subscription \$4.50 from the Editorial Offices, Law Department, Stanford University, Stanford, California, U.S.A.

WE of the *Modern Law Review* are very pleased to welcome this latest addition to the many fine legal journals published by the Law Schools of American Universities. This first number indeed establishes a high standard of interest, variety and sound scholarship which the Editorial Board will have to work hard to maintain.

Among the articles which I particularly liked were the contribution of ex-Dean Kirkwood on the 'Appropriation of Percolating Water', which shows how American lawyers can modify a hampering decision like *Acton v. Blundell* (12 M. & W. 324) so as to meet the requirements of modern life; 'Congress and the Atom', by Herbert S. Marks, who has both the legal and administrative experience required for the tackling of this subject: 'Who Owns the Clouds', in which some of the legal problems raised by recent successful efforts at rain-making are discussed; and 'Control of Communist Activities', which contains a useful survey of State legislation relating to subversive activities. Long may the *Stanford Law Review* flourish.

C.

THE AGRICULTURAL HOLDINGS ACT, 1948. By J. MUIR WATT, M.A.
Current Law Guide No. 5. [London : Sweet & Maxwell, Ltd.,
and Stevens & Sons, Ltd. 1948. 95 pp. 6s. 6d.]

THIS further addition to the series of law guides is a useful account of the Agricultural Holdings Act, 1948. Largely, it is an explanation of the Act but some of its controversies are discussed, and the relation of the 1948 Act to other legislation is adequately covered. Its usefulness is increased by the citation of statutory instruments made under the Agriculture Act, 1947, the validity of which are preserved. The Appendices contain useful tables of time-limits under the Act and of matters referred to arbitration. While many of the questions provoked by the Act are raised, further discussion of some might be useful as of the priority of charges under s. 74, some of the statements about which are not clear.

J. D. B. MITCHELL.

Books also received :—

INDEX TO THE COMPANIES ACT, 1948. Tenth Edition. By CECIL W. TURNER, Barrister-at-Law, assisted by PETER GARDINER, LL.B.
[London : Solicitors' Law Stationery Society, Ltd. 15s.]

THIS useful book comprises a King's Printers' copy of the Act, an index, and tables showing where corresponding sections of the repealed Acts are to be found in the 1948 Act and vice versa.

THE SECRETARIAL HANDBOOK. By EDWARD WESTBY-NUNN, B.A., LL.B., Barrister-at-Law. Fifth Edition. [London : Solicitors' Law Stationery Society. 1948. 8s. 6d.]

THIS book has been substantially re-written in the light of the Companies Act, 1948. It is a most useful practical guide to a company secretary's duties.

PALMER'S COMPANY GUIDE. Thirty-sixth edition. By J. CHARLESWORTH, LL.D. 'This is the Law' Series. [London : Stevens & Sons, Ltd. 1948. x and 296 pp. (with index). 6s. 6d.]

PALMER'S PRIVATE COMPANIES. Forty-first edition. By J. CHARLESWORTH, LL.D. 'This is the Law' Series. [London : Stevens & Sons, Ltd. 1948. viii and 102 pp. (with index). 3s.]

BOTH of these well-established little manuals have been reviewed from time to time in these pages. The present editions have been called for by the passing of the Companies Act, 1948, which consolidates the extensive alterations of the law effected by the Act of 1947. In the case of Private Companies the changes though of some importance, especially that introducing the new 'exempt private company', are not extensive and have not therefore given rise to much re-writing. In the general Company Guide the changes are naturally much more numerous. The work in both cases has been done by Dr. Charlesworth with his usual skill and accuracy. We know of no other volumes which provide for the ordinary business man such a comprehensive and lucid guide to the subject at such a reasonable price.

C.